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Cultural Norms and Race Discrimination Standards: A Case Study in How the Two Diverge

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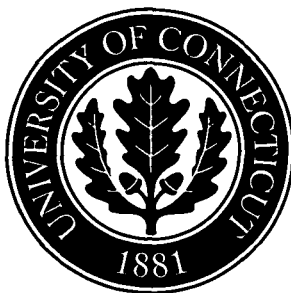
Cultural Norms and Race Discrimination Standards: A Case Study in How the Two Diverge

DEREK W. BLACK

The legal standard for race discrimination—the intent standard—has been scrutinized and justified for decades, but that conversation has occurred almost entirely within the legal community. Relatively little effort has been made to engage the public. This Article posits that the discussion of discrimination standards must account for and include public understandings of race and discrimination because race is a socially constructed concept and discrimination is culturally contingent. Race discrimination standards based solely upon the legal community’s perceptions are susceptible to significant flaws. This Article begins the incorporation of public understandings of race and discrimination by examining the public’s reaction to a recent cartoon that, on its face, is racially neutral or ambiguous, but in light of surrounding cultural context and history is arguably racist. The cartoon generated a flurry of internet postings, reactions, and polls. This Article systematically studies those reactions and finds that the public tends to conceptualize race discrimination differently than the courts and, thus, calls into question the validity of current legal standards.

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Cultural Norms and Race Discrimination Standards: A Case Study in How the Two Diverge

DEREK W. BLACK*



Sean Delonas, New York Post, Feb. 18, 2009

I. INTRODUCTION

The appropriate legal measure for race discrimination has been a point of serious contention for decades. Although the Supreme Court initially permitted claims based primarily upon discriminatory effects,¹ it subsequently issued a number of decisions that indicate that plaintiffs must also demonstrate intentional discrimination.² Disagreeing with the Court,

* Associate Professor of Law and Director of the Education Rights Center, Howard University School of Law. I would like to thank Dean Kurt Schmoke for his continued support of my scholarship. I would also like to thank my research assistant Waris Hussain, who painstakingly scoured the internet for responses to the cartoon and reviewed them. His enthusiasm for the project allowed me to study the subject with more depth than I had initially anticipated.

¹ For instance, in the context of education, the Court initially only required the existence of racial disparities to support a claim. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971); *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19, 20 (1969); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 435, 441 (1968). The Court was even more explicit on this point in the context of employment. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

² *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 284, 293 (2001) (holding that no cause of action for disparate impact exists under Title VI of the Civil Rights Act of 1964 and that plaintiffs must demonstrate intentional discrimination); *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (“A plaintiff must prove that the disputed plan was ‘conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.’” (alterations in original) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149

Congress has, in some instances, responded by passing legislation to reinstate a plaintiff's ability to assert a claim based on discriminatory effects.³ Where Congress has been unwilling or, due to constitutional constraints, unable to reverse the Court,⁴ scholars have roundly criticized the Court as misunderstanding discrimination and furthering illegitimate ends.⁵ While this issue has captivated courts, scholars, and, at times, Congress, the public's appraisal of racial discrimination has been sorely missing from the conversation. In many respects, the public's appraisal is the most important because neither race nor discrimination is a self-defining concept. Rather, as many, including some members of the Court, have pointed out, discrimination is an ambiguous term.⁶ The meaning of discrimination depends on the context in which it exists.⁷ Thus, the public, rather than the courts, adds real substance to discrimination through cultural norms that determine what is offensive, racist, neutral, or

(1971)); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *Washington v. Davis*, 426 U.S. 229, 238–42 (1976) (stating that a "purpose to discriminate" must be shown by plaintiff claiming discriminatory practices in jury selection (internal quotation marks omitted)).

³ Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074–75 (codified at 42 U.S.C. § 2000e-2(k) (2006)) (overturning the Court's attempt to limit the application of the disparate impact standard in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–61 (1989)); *Thornburg v. Gingles*, 478 U.S. 30, 71–73 (1986) (discussing Congress's amendment to Section 2 of the Voting Rights Act reversing the Court's prior holding that intent was required to sustain a voting rights claim); see also Civil Rights Act of 2008, S. 2554, 110th Cong. §§ 101–06 (2008) (proposing a fix to the Court's holding in *Alexander v. Sandoval*, 532 U.S. 275 (2001)); Civil Rights Act of 2004, H.R. 3809, 108th Cong. §§ 101–06 (2004) (same).

⁴ Congress lacks the power to reverse the Court on the Fifth and Fourteenth Amendments, other than through the extraordinary measure of a constitutional amendment.

⁵ See, e.g., Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 966–68, 967 n.66 (1993) (listing the "numerous" critics of the intent requirement). See generally Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050 (1978) (analyzing twenty-five years of Supreme Court discrimination cases to "account for the dissonance in [its] dialogue"); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 286–91 (1997) (criticizing the Court's refusal to adapt its approach in discrimination cases to changes in the nature of discrimination).

⁶ See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201–02 (1979); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 337 (1978) (Brennan, J., concurring in part and dissenting in part) (recognizing that discrimination is not a static concept, but one that Congress believed should "be shaped by experience, administrative necessity, and evolving judicial doctrine"); John Devlin, *Louisiana Associated General Contractors: A Case Study in the Failure of a State Equality Guarantee to Further the Transformative Vision of Civil Rights*, 63 LA. L. REV. 887, 906 (2003); Ethan J. Leib, *Why Supermajoritarianism Does Not Illuminate the Interpretive Debate Between Originalists and Non-originalists*, 101 NW. U. L. REV. 1905, 1915 n.40 (2007); John A. Powell & Stephen Menendian, *Parents Involved: The Mantle of Brown, The Shadow of Plessy*, 46 U. LOUISVILLE L. REV. 631, 673–75 (2008) (discussing the ambiguity of the Equal Protection Clause); see also *Gen. Dynamics Land Sys., Inc., v. Cline*, 540 U.S. 581, 591, 596–98 (2004) (analyzing the ambiguity of the concept of age discrimination); Lauren LeGrand, Note, *Proving Retaliation After Burlington v. White*, 52 ST. LOUIS U. L.J. 1221, 1242 (2008).

⁷ See, e.g., Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1020 (2004) (referencing social psychology research that indicates racial bias and discrimination is "situation sensitive").

appropriate. Legal analysis that proceeds without this substance runs the risk of serious flaws.

This Article lays an initial foundation for assessing whether a gap exists between legal and cultural concepts of discrimination. As an exhaustive analysis of our national understanding of race and discrimination is beyond the scope of any single article, this Article attempts to focus on but a few core discrimination concepts through an examination of the public's reaction to an actual set of facts. In February 2009, the *New York Post* ran a cartoon that depicted a monkey being shot by two policemen with a blurb indicating that next time someone else would have to write the stimulus bill.⁸ Many readers immediately connected the cartoon with President Obama. He had been the lead advocate for the stimulus bill for months and the cartoon's imagery evoked memories of past depictions of African Americans as apes.⁹ Yet, just as quickly, others defended the cartoon, arguing that it was merely a failed attempt at humor.¹⁰ Debates over race are common, but what made this cartoon unique was that it raised several questions that go to the core of discrimination's meaning and did so in a way that was intellectually accessible to the general public. Using online media, the public extensively debated the relevance of outside factors in interpreting the cartoon, whether the cartoon was or was intended to be racist, whether the cartoonist's intent or the effects of the cartoon mattered most, and whether someone connected to the cartoon simply should have known better.

All of these questions have close analogs in intentional discrimination jurisprudence. But the public's answer to these questions in the context of the cartoon suggests an approach to discrimination that is different than the courts. In contrast to the courts, the public minimized the relevance of intent and focused primarily on the cartoon's effect. In fact, the largest coherent group of respondents rejected the relevance of intent altogether. This group argued that the cartoonist was responsible for the consequences of his actions, regardless of whether he intended them.¹¹ Moreover, responsibility of this sort effectively imposes an affirmative duty on individuals to consider the impact of their actions in advance, which necessarily entails considering the surrounding context.

As the cartoon on its face does not make any explicit reference to race or President Obama, context and cultural norms offer the only explanations for the public's strong reaction. In particular, much of the debate was based upon historical depictions of African Americans as apes or primates.

⁸ Sean Delonas, *Cartoon*, N.Y. POST, Feb. 18, 2009, available at <http://www.nypost.com/opinion/cartoons/delonas.htm>.

⁹ See generally Les Payne, *The Post's Stimulus Chimp*, THE NATION, Feb. 27, 2009, available at <http://www.thenation.com/article/posts-stimulus-chimp> (discussing the public reaction to the cartoon).

¹⁰ *Id.* (noting the arguments of those who defended the cartoon).

¹¹ See *infra* Part III.D.

Imagery of this sort draws upon the purported “scientific” arguments of the nineteenth century that Africans were a lower order of humans who were more closely related to apes in the evolutionary chain than whites.¹² Thus, slavery was consistent with the natural order.¹³ Even after slavery, popular culture in the United States routinely depicted African Americans as apes to further the general notion that African Americans were uncivilized and lacking in intelligence,¹⁴ and to justify segregation and other discriminatory practices.¹⁵

A recent study by psychologists at leading universities indicates that the images are not just part of our distant past. The study found that while these portrayals have disappeared from popular culture, the historical impact has been so significant that, still today, “many Americans subconsciously associate blacks with apes.”¹⁶ One of the lead researchers recently stated:

“Despite widespread opposition to racism, bias remains with us . . . African Americans are still dehumanized; we’re still associated with apes in this country. That association can lead people to endorse the beating of black suspects by police officers, and I think it has lots of other consequences that we have yet to uncover.”¹⁷

A familiarity with these historical images and the importance ascribed to them largely formed the dividing line between those who found the cartoon offensive and those who did not. Given the prevalence of these depictions in the past, the largest group of respondents could not imagine the cartoon as anything but a new example. Others, in contrast, avoided addressing history at all, arguing on other grounds that this cartoon could not have been directed at the President. Most telling, however, were those who, because of youth, were unfamiliar with earlier historical depictions and, thus, simply could not even appreciate what others were debating.

This Article attempts to bring order to these varying ideas by collecting readers’ written comments from news outlets’ websites and categorizing them. In general, the responses were consistent with polls conducted by other sources,¹⁸ but the benefit of analyzing written comments is that the

¹² GEORGE BORNSTEIN, *MATERIAL MODERNISM: THE POLITICS OF THE PAGE* 145–46 (2001); see also J.C. NOTT & GEO. R. GLIDDON, *TYPES OF MANKIND* 246–71 (1854).

¹³ KEVIN BROWN, *RACE, LAW AND EDUCATION IN THE POST DESEGREGATION ERA* 44 (2005).

¹⁴ See, e.g., *Americans Still Linking Blacks to Apes*, SCIENCEBLOG (Feb. 8, 2008), <http://scienceblog.com/cms/americans-still-linking-blacks-apes-15428.html> [hereinafter SCIENCEBLOG] (discussing a depiction of evolution from chimpanzee to white man in a 1970 illustration entitled “March of Progress”).

¹⁵ BROWN, *supra* note 13, at 58.

¹⁶ SCIENCEBLOG, *supra* note 14.

¹⁷ *Id.* (quoting Jennifer Eberhardt, a professor of psychology at Stanford University).

¹⁸ See *infra* Part III.C.

comments offer more than just simplified opinions and conclusions. They offer rationales and arguments that provide a basis for drawing inferences that are relevant beyond the cartoon itself. In particular, the comments can be assessed for their consistency with current and proposed discrimination standards. This Article's assessment, ultimately, demonstrates that the current legal approach to discrimination is inconsistent with popular understandings of discrimination. Unlike the legal standard, the public tends to focus primarily on the discriminatory effect of actions, but in a way that on some level still accounts for intent.

Before delving any further into the issues, however, it is important to note that this Article in no way intends to suggest that First Amendment rights should be curtailed or that respondents indicated as much. No matter the intent or level of racism involved in the cartoon, individuals have the right to express their ideas.¹⁹ This Article focuses on this cartoon simply because it provides a unique opportunity to examine the public's unfiltered perceptions of race, racism, and discrimination. These perceptions and the principles related to them are the only subjects of this Article, not whether anyone involved with the cartoon actually warrants legal censure. In short, the question is whether actions equivalent to the cartoon, but not raising First Amendment protections, would be discriminatory and warrant legal recourse.²⁰

This Article begins, in Part II, by summarizing the debate over race discrimination standards that has occurred within the courts, Congress, and the academy. It then explains why the wider public is crucial to this conversation and how the national conversation regarding the cartoon provides a valuable opportunity to assess the public's opinion. Part III of this Article details the actual study of the public's response, including a full explanation of the story behind the cartoon, the method for gathering and analyzing the responses, and the results and conclusions of the study. The Article ends by analyzing how the study's results bear on current and proposed legal discrimination standards, finding that the current regime is likely flawed.

¹⁹ See, e.g., *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43–44 (1977) (*per curiam*) (reversing an order of an injunction against people who wanted to display symbols of the Nationalist Socialist Party of America); *Brandenburg v. Ohio*, 395 U.S. 444, 456–57 (1969) (Douglas, J., concurring) (discussing permissible speech).

²⁰ My preference would have been to analyze a situation that did not implicate the First Amendment, as it admittedly drew the attention of some respondents and will probably do the same with some of this Article's readers. Nonetheless, the other aspects of this cartoon were perfect for study and not easily identified in other contexts, making it hard for both me and most other viewers to ignore.

II. THE PAST DEBATE OVER RACIAL DISCRIMINATION STANDARDS

A. *The Judiciary, Congress, and the Academy*

The legal standards for establishing prohibited discrimination have varied over the past half-century, generating significant debate and contention in the process.²¹ When the judiciary first began to combat discrimination in schools and elsewhere in the 1950s and early 1960s, the basic existence of segregation and inequality was sufficient to establish an equal protection violation.²² With no clear distinction between intent and effect, plaintiffs could challenge vast racial inequities.²³ When Congress had the opportunity to directly address the issue by setting a standard in the Civil Rights Act of 1964, it passed on the opportunity and left the final bill silent as to the requisite intent or standard for establishing violations.²⁴ One scholar concludes that Congress intentionally left the question open for federal agencies to resolve.²⁵ Regardless of Congress's intent, agencies filled the void that Congress created, enacting regulations that prohibited policies and actions that had a racially disparate impact.²⁶ Thus, proof of intent to treat individuals or groups differently was unnecessary.

In 1973, however, the Supreme Court distinguished intentional from unintentional school segregation, holding that a plaintiff must demonstrate the former.²⁷ Three years later, the Court expanded the application of intentional discrimination to all race discrimination claims under equal

²¹ See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66, 270–71 (1977); *Washington v. Davis*, 426 U.S. 229, 238–42 (1976); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1507 (2d ed. 1988); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 22–26 (1976) (advocating for an antidiscrimination principle that in some instances would prohibit disparate impact and criticizing the Supreme Court's rejection of disparate impact claims). See generally Freeman, *supra* note 5 (surveying and criticizing the Supreme Court's discrimination doctrine from the 1950s through the late 1970s); Selmi, *supra* note 5 (discussing the evolution of the Court's discrimination doctrine).

²² *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 435, 441 (1968); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 495 (1954).

²³ See, e.g., *NAACP, Jacksonville Branch v. Duval Cnty. Sch.*, 273 F.3d 960, 967 (11th Cir. 2001) (analyzing the various aspects of education that courts should examine for inequities per the Court's holding in *Green v. County School Board*, 391 U.S. 430 (1968)). In other contexts such as housing and environmental justice, plaintiffs would be able to challenge various inequities, but for recent requirements that they demonstrate intent. See, e.g., *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 274 F.3d 771, 774 (3d Cir. 2001) (rejecting a claim of environmental racism based on the absence of evidence of intentional discrimination); *Latinos Unidos de Chelsea en Accion v. Sec'y of Hous. & Urban Dev.*, 799 F.2d 774, 795 (1st Cir. 1986) (requiring residents to prove intentional discrimination in funding of housing projects).

²⁴ Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 GEO. L.J. 1, 24–27 (1981).

²⁵ *Id.* at 28–30, 48.

²⁶ See, e.g., 12 C.F.R. § 528.9(b) (2002); 24 C.F.R. § 6.4(a)(1)(ix) (2002); 34 C.F.R. § 100.3(2) (2002); *id.* § 300.646 (prohibiting disproportionality in special education programs and providing schools with various mechanism to limit and prevent this its occurrence).

²⁷ *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973).

protection.²⁸ Under the intent standard, a racially disparate effect alone is insufficient to establish an equal protection claim.²⁹ Race must be a factor that motivated a defendant to act.³⁰ In later decisions, the Court would further specify that plaintiffs must demonstrate that the government acted because of race, not simply in spite of the effects it might have on a particular race.³¹ In effect, the Court elevated the intent requirement to that of subjective motive, not objective expectation.³²

After accomplishing this shift in equal protection law, the Court temporarily eroded the disparate impact standard in statutory claims as well. In particular, the Court held that certain disparate impacts were insufficient to sustain a claim under the Voting Rights Act of 1965 and also under portions of the Civil Rights Act of 1964.³³ Congress, however, responded by amending both statutes to reinstate a plaintiff's ability to challenge practices that have a disparate impact.³⁴ The amendments to the Civil Rights Act, however, spoke only to employment discrimination, and the Court has been free to require intentional discrimination elsewhere. Most notably, in 2002, the Court held that plaintiffs must demonstrate intentional discrimination under Title VI of the Civil Rights Act, which protects individuals from discrimination in federally funded programs.³⁵ Congress has not responded to recent decisions of this sort and they remain the law.³⁶ Now, with few exceptions, the intentional discrimination

²⁸ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66, 270–71 (1977); *Washington v. Davis*, 426 U.S. 229, 238–42 (1976).

²⁹ *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464–65 (1979); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *Arlington Heights*, 429 U.S. at 264–66, 270–71.

³⁰ *Arlington Heights*, 429 U.S. at 265–66.

³¹ *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987); *Feeney*, 442 U.S. at 279.

³² See Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 566–67 (2006) (discussing the lower courts' preference for an objective intent standard and the Court's holdings that required a subjective standard).

³³ See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–51 (1989) (limiting the application of the disparate impact standard in employment discrimination cases to specific labor markets), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (codified in scattered sections of 42 U.S.C.); *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (rejecting the disproportionate effect of voting policies or districts as the basis for establishing a voting rights claim and instead requiring intentional discrimination).

³⁴ Civil Rights Act of 1991, § 105, 105 Stat. at 1074–75 (codified at 42 U.S.C. § 2000e-2(k) (2006)) (overturning the Court's holding in *Wards Cove Packing*, 490 U.S. at 642, that limited the application of the disparate impact standard); *Thornburg v. Gingles*, 478 U.S. 30, 71–73 (1986) (discussing Congress's amendment to Section 2 of the Voting Rights Act reversing the Court's prior holding that intent was required to sustain a voting rights claim).

³⁵ *Alexander v. Sandoval*, 532 U.S. 275, 284, 293 (2001) (holding that no cause of action for disparate impact exists under Title VI of the Civil Rights Act of 1964 and that plaintiffs must demonstrate intentional discrimination).

³⁶ See Civil Rights Act of 2008, S. 2554, 110th Cong. §§ 101–06 (2008) (proposing a fix to the Court's holding in *Sandoval*, 532 U.S. at 275); Civil Rights Act of 2004, H.R. 3809, 108th Cong. §§ 101–06 (2004) (same).

standard controls plaintiffs' ability to redress racial inequities.³⁷

Since the Court first adopted the intent standard, it has been both vigorously defended and attacked. Those defending the standard argue that requiring anything short of intent would expose the government and other defendants to extensive unwarranted liability.³⁸ Racial disparities exist in almost every facet of public life, and standards that prohibit disparate impact would create legal challenges to almost all of them.³⁹ The defenders would concede that, if these social structures were designed to disadvantage certain racial groups, the law should invalidate them. But in the case of structures such as our tax system, they argue the government's motives are entirely neutral in regard to race and, thus, the system should not be open to challenge simply because it happens to affect racial groups differently.⁴⁰ Many racial disparities exist, not because of governmental or other institutional discrimination, but because of various private actions and demographic factors.⁴¹ Thus, the government does not produce racial inequity itself, but simply acts within a system predominated by it. Given the prevailing unequal system, a disparate impact standard would saddle the government with the huge administrative burden of continually reshaping its policies to avoid racial disparities, even when race is not a factor in the government's initial decision.⁴² Imposing these costs on

³⁷ Selmi, *supra* note 5, at 285 (indicating that notwithstanding the various different constitutional and statutory laws that apply to race discrimination the Supreme Court effectively has only one standard: intentional discrimination). Justice Scalia, however, suggests there should be no exceptions. Rather, if the Constitution only prohibits intentional discrimination, then Congress should lack the power to prohibit certain disparate impacts. Ricci v. DeStefano, 129 S. Ct. 2658, 2682–83 (2009) (Scalia, J., concurring).

³⁸ See McClesky v. Kemp, 481 U.S. 279, 292 (1987) (allowing a death penalty system fraught with bias to continue); Washington v. Davis, 426 U.S. 229, 248 (1976) (permitting an employment test that disproportionately excluded vast numbers of minority applicants to remain in effect, while noting that a disparate impact standard might invalidate a host of tax, welfare, public service, and other statutes).

³⁹ See ADALBERTO AGUIRRE, JR., RACIAL AND ETHNIC DIVERSITY IN AMERICA 27–38, 42 (2003) (discussing racial disparities through examination of social indicators including educational attainment, poverty levels, and income levels). For a full discussion of racial disparities, see generally DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

⁴⁰ Davis, 426 U.S. at 248; Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 300 (1972) (suggesting that disproportionate-impact analysis might invalidate “tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities”); see also Ricci, 129 S. Ct. at 2672 (granting certiorari on a Title VII claim).

⁴¹ See, e.g., Missouri v. Jenkins, 515 U.S. 70, 102 (1995); Freeman v. Pitts, 503 U.S. 467, 494–95 (1992).

⁴² Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988) (“We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures.”); Presidential Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701, 1701–02 (Nov. 25, 1991) (expressing concern with the unfair burdens and incentives that disparate impact standards create); see also Davis, 426 U.S. at 248; David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 956 (1989) (discussing the intent standard as an effort to “tam[e] Brown” and avoid these costs).

government or businesses is both inefficient and unfair.⁴³ Finally, some defenders of the intent standard conceptualize discrimination as immoral activity, and disparate impact as only an incidental byproduct of otherwise moral behavior.⁴⁴

As those objecting to the intent standard have found increasingly little affirmation in case law, their normative and practical critiques of the standard have been far more extensive. First, one of the more prevalent critiques among legal scholars is that most modern discriminatory action results from subconscious biases rather than from a conscious desire to discriminate.⁴⁵ Developments in social science reveal that, although we are rarely consciously aware of it, our decisions and actions are subconsciously affected by various stereotypes, racial associations, and biased messages that dominate our culture.⁴⁶ The intent standard, however, focuses on conscious motivations. Thus, even though race is often a factor in why someone acted in a particular way, the current intent standard fails to account for it.⁴⁷ In effect, the intent standard is premised on the historical “bigoted decision-maker,”⁴⁸ rather than the current reality where explicit racial bias is no longer acceptable and, consequently, operates well below the conscious surface.⁴⁹

Second, as a practical matter, the standard is simply difficult to administer.⁵⁰ Because the standard searches for subjective motivations, it often places a nearly insurmountable burden on plaintiffs to demonstrate the inner workings of an individual’s mind.⁵¹ In the absence of direct

⁴³ See Jennifer C. Braceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1190–1201 (2002) (arguing against the use of disparate impact in educational testing contexts); *Disparate Impact*, CENTER FOR EQUAL OPPORTUNITY (July 16, 2007), <http://www.ceousa.org/content/view/339/96/>.

⁴⁴ See Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 212–14 (1992).

⁴⁵ This argument dates back to Charles Lawrence’s seminal piece on the subject, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 335 (1987).

⁴⁶ Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1276 (2002); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–1211 (1995).

⁴⁷ See Lawrence, *supra* note 45, at 323.

⁴⁸ See *TRIBE*, *supra* note 21, at 1509 (indicating the Court was still looking for the “bigoted decision-maker”); Selmi, *supra* note 5, at 335 (discussing the Court’s difficulty in shifting from a segregation mentality).

⁴⁹ E.g., DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 401 (5th ed. 2004); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 91–96 (2003) (discussing the shift in the nature of discrimination from conscious animus to unconscious bias).

⁵⁰ *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 225–26 (1973) (discussing the problem courts have in resolving intent necessary to establish *de jure* discrimination in the context of compulsory student transportation); Strauss, *supra* note 42, at 953 (finding that one can only speculate as to how a different group would have been treated).

⁵¹ See, e.g., *United States v. Bd. of Sch. Comm’rs*, 573 F.2d 400, 413 (7th Cir. 1978); *Hart v. Cmty. Sch. Bd. of Educ.*, N.Y. Sch. Dist. No. 21, 512 F.2d 37, 50 (2d Cir. 1975) (“To say that the

evidence of racial motivations, the trier of fact can only speculate,⁵² and speculation makes the outcome heavily dependent on the fact-finder's own world view, opinions, and biases, rather than any real evidence.⁵³ As a result, the intent standard can lend itself to inconsistent and unreliable outcomes.⁵⁴ Yet, as a practical matter, modern courts generally refuse to make the inferences necessary to find discrimination.⁵⁵ Ironically, the intent standard for race (and gender) is inconsistent with the intent standards for other constitutional and civil rights violations, which either do not require intent at all or base intent on objective facts relating to foreseeability.⁵⁶ Recognizing these problems, some conclude that a disparate impact standard is simply an efficient means for identifying conduct that often involves intentional discrimination on some level, but which is difficult to prove.⁵⁷

Third, scholars argue that the intent standard reinforces the status quo and protects white interests. In nearly every sphere of life, racial

foreseeable must be shown to have been actually foreseen would invite a standard almost impossible of proof save by admissions."'). Similarly, the Sixth Circuit wrote:

[I]t would be difficult, and nigh impossible, for a district court to find a [defendant] guilty of [intentional discrimination], unless the court is free to draw an inference of [discriminatory] intent or purpose from a pattern of official action or inaction which has the natural, probable and foreseeable result of increasing or perpetuating [a racially disparate impact].

NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1047-48 (6th Cir. 1977).

⁵² See *Keyes*, 413 U.S. at 225-27; Strauss, *supra* note 42, at 953-68 (noting that one can only speculate as to how a different group would have been treated).

⁵³ See *City of Memphis v. Greene*, 451 U.S. 100, 141-47 (1981) (Marshall, J., dissenting) (discussing his differing interpretation of the racial import of various facts, such as the implicit meaning of "undesirable traffic"); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 771 (1995) (explaining the difficulty federal judges may have in relating to the plight of poor blacks in Cairo, Illinois); Freeman, *supra* note 5, at 1052 (noting "the lack . . . of any objective criteria to which one might appeal to justify particular substantive decisions"); Selmi, *supra* note 5, at 280-83 (arguing that "how one defines discrimination, specifically how the Court has defined discrimination, is premised on one's expectations of what a nondiscriminatory world would look like").

⁵⁴ See Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1190 (1991) (detailing empirical findings that show a pattern of failing to infer discrimination); Strauss, *supra* note 42, at 938 (arguing that "when the discriminatory intent standard is applied rigorously, it defeats itself . . . by dissolving into questions that are speculative and, in some instances, literally meaningless").

⁵⁵ Eisenberg & Johnson, *supra* note 54, at 1182-83.

⁵⁶ See, e.g., *Smith v. City of Jackson*, 544 U.S. 228, 231-32 (2005) (recognizing a disparate impact claim in age discrimination claims); *Alexander v. Choate*, 469 U.S. 287, 299 (1985) (recognizing a disparate impact claim for disability claims); *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001) (determining that the deliberate indifference standard applies); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999) (affirming that petitioner had to prove intentional discrimination); *Bartlett v. N.Y. Bd. Law Exam'rs*, 156 F.3d 321, 331 (2d Cir. 1998) (quoting *Ferguson v. City of Phoenix*, 931 F. Supp. 688, 697 (D. Ariz. 1996)); Black, *supra* note 32, at 537-42 (comparing race discrimination to other civil rights and discrimination claims).

⁵⁷ See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (noting that some disparate impacts are equivalent to intentional discrimination); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 495-96, 520-21 (2003) (discussing disparate impact as an attempt to get at intentional discrimination, historical segregation, and unequal structures).

minorities lag behind whites.⁵⁸ While many of these inequities stem from past governmental and private discrimination, the creation and continuation of these inequities does not happen of its own accord, nor is it natural.⁵⁹ Rather, the continuation of racial inequity is perpetually dependent on active decisions and policies that institutions and individuals make on a regular basis.⁶⁰ To some, these decisions appear to be business as usual, rather than the perpetuation of discrimination, but they are, nonetheless, value choices to protect existing interests and structures. By limiting plaintiffs' claims to those involving current conscious efforts to discriminate, the intent standard simply masks and protects the decisions to perpetuate the racial status quo.⁶¹ Regardless of the harm or injustice of these decisions, the intent standard treats them as neutral if they cannot be connected to a direct racial consideration.⁶² Thus, rather than challenging the status quo, the intent standard makes equal protection law a defense for it. In this respect, some scholars go even further and assert that the intent standard protects "whiteness."⁶³ If white norms can be tied to something other than racial animus, the intent standard treats them as neutral and beyond challenge, notwithstanding the racially disparate impacts that result by acting upon these norms.⁶⁴ Or as one scholar argues, the intent standard operates from the perspective of the perpetrator rather than the victim; so long as the perpetrator does not mean any harm, the discriminatory impact on the victim is irrelevant.⁶⁵

Fourth, others find that the distinctions between intentional discrimination and disparate impact are not significant and are emphasized in ways that create a false dichotomy.⁶⁶ The Supreme Court, in particular, has suggested there is a rigid distinction between impact and intent whereby disparate impacts are not actually discrimination or a denial of

⁵⁸ See generally MASSEY & DENTON, *supra* note 39 (describing past and current trends of discrimination through a history of segregation).

⁵⁹ MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 77-78 (1990) (concluding that the status quo is not natural, uncoerced, or good).

⁶⁰ See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 213-14 (1973) (discussing the various options school boards have and their relationship to continued segregation); MINOW, *supra* note 59, at 77-78.

⁶¹ See MINOW, *supra* note 59, at 77-78 (discussing the failure of the law to limit the perpetuation of the status quo).

⁶² See *id.*; Freeman, *supra* note 5, at 1052-57 (discussing the Supreme Court's perpetrator perspective which treats the condition of inequality as fair).

⁶³ Flagg, *supra* note 5, at 966-69.

⁶⁴ *Id.* at 964.

⁶⁵ Freeman, *supra* note 5, at 1052-54.

⁶⁶ Black, *supra* note 32, at 569; Green, *supra* note 49, at 143 (arguing, in regard to the distinction between discrimination and disparate impact in employment discrimination, that "[i]t is neither realistic nor sensible, however, to combat the operation of discriminatory bias in the modern workplace along such dichotomous lines"). On rare occasions, even the Court has acknowledged that the distinction between the two is blurred. See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (indicating that some disparate impacts are equivalent to intentional discrimination).

equal protection.⁶⁷ But if the government has an affirmative duty to ensure equal opportunity among its citizens, the failure to ensure it for particular racial groups is just as problematic for those citizens as it would be if the government intentionally denied the group opportunities.⁶⁸ Moreover, the racial impacts that a decision will cause are not merely incidental by-products that are disconnected from the decision-making process; they are inherently and volitionally connected to and part of the process and ultimate decision.⁶⁹ For instance, legislative bodies' decisions are deliberate, calculated, and rarely lack a specific awareness and valuation of the results.⁷⁰ If a legislative body by some chance makes a decision in ignorance and without deliberation, it would seem illogical to say that, between two actions producing the same unequal opportunity, one is not a denial of equal protection by virtue of its ignorance while the other is because of its knowledge. Some scholars further note that the decision born out of ignorance represents a defect in the legislative process that is prohibited by due process as well as equal protection, or rather the Fourteenth Amendment in its totality.⁷¹

Finally, the language of the Equal Protection Clause does not even include the term discrimination, much less require *intentional* discrimination.⁷² Rather, the language speaks only of denials of equal

⁶⁷ See, e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672 (2009) (indicating that intentional discrimination or "[d]isparate-treatment cases present 'the most easily understood type of discrimination'" (quoting *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977))); *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) (assuming that regulations may validly proscribe activities that have a disparate impact); *Washington v. Davis*, 426 U.S. 229, 254 (1976) (Stevens, J., concurring) (agreeing that a constitutional issue does not arise every time some disproportionate impact is shown).

⁶⁸ See Black, *supra* note 32, at 562 (discussing the government's failure of equal consideration); Freeman, *supra* note 5, at 1052–53 (discussing discrimination from the perspective of the victim).

⁶⁹ See Lawrence, *supra* note 45, at 354 ("[C]ases where racially discriminatory impact results directly from past intentional discrimination or from current but unprovable racial animus will be well within judicial reach.").

⁷⁰ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135–45 (1980). The legislative or democratic process inherently entails a constant weighing of costs and benefits in the attempt to identify the most palatable outcome or policy. The law's expectation is that our representatives will not make irrational decisions or unfairly burden particular segments of the citizenry through this process. In fact, in regard to race, the Equal Protection Clause commands this fair treatment and consideration. Thus, equal protection no more permits decision makers to mis-weigh the costs and benefits based on latent biases or indifferences than it permits mis-weighing them based on explicit racial motivations. Conscious or otherwise, such a decision is an irrational one that treats races unequally. *Id.* at 135–36. A failure in this respect is a "process defect" that the Fourteenth Amendment prohibits. See Lawrence, *supra* note 45, at 345 (describing and labeling the "process defect" term).

⁷¹ ELY, *supra* note 70, at 135–45; Lawrence, *supra* note 45, at 343–44.

⁷² U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). Some earlier drafts of Section 1 of the Fourteenth Amendment did include the term discrimination, but that language was rejected and may have been even more vague than the final text. CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION 1864–88*, at 1272–73, 1282 (1971).

protection, offering no explanation or definition as to its meaning.⁷³ Equal protection could mean equal results, equal process, equal opportunity, non-discrimination (based on any number of factors), and various other concepts of equality.⁷⁴ In short, the language on its face is ambiguous. Some would argue that legislative history is, likewise, susceptible to varying interpretations. While pinpointing the exact contours of equal protection might be impossible,⁷⁵ the legislative history does suggest that the Framers' concept of equal protection was broader than simply prohibiting intentional discrimination and would have included the affirmative right to equal consideration and access.⁷⁶

The Court, however, has largely ignored the ambiguity of equality itself and instead treated the prohibition against denials of equal protection as equivalent to, or no more than, a prohibition against discrimination.⁷⁷ Discrimination, however, is not any more easily defined than equal protection.⁷⁸ Rather, discrimination is arguably more culturally contingent than equal protection.⁷⁹ Whether a particular act harms, offends, or stereotypes someone based on race is largely dependent on the context in which it occurs.⁸⁰ As Charles Lawrence aptly pointed out: women and men do not perceive discrimination based on bathroom signs that limit access to a particular gender, but all would perceive discrimination if bathrooms limited access by race.⁸¹

⁷³ TRIBE, *supra* note 21, at 1437–39 (discussing equal protection's multiplicity); James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1542 (1990) (noting that equal protection "does not very clearly say what it means"); powell & Menendian, *supra* note 6, at 674–75.

⁷⁴ TRIBE, *supra* note 21, at 1437–39.

⁷⁵ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954) (finding that the legislative history is inconclusive as to school segregation).

⁷⁶ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1977); ELY, *supra* note 70, at 84; HOWARD JAY GRAHAM, *EVERYMAN'S CONSTITUTION* 8 (1968) (finding that equal protection was designed to ensure that all had equal access to the government's "bounties"); Brest, *supra* note 21, at 6–8; see also WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 73 (1988) (noting that Congressman John Bingham, the author of section one of the Fourteenth Amendment, initially argued that "[t]he spirit, the intent, the purpose of our Constitution is to secure equal and exact justice to all men"). This concept was ironically articulated in a case that the Court later relied on in *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896). See *Roberts v. City of Bos.*, 59 Mass. 198, 206 (1849) (holding that equal protection requires "that the rights of all . . . are equally entitled to the paternal consideration and protection of the law, for their maintenance and security").

⁷⁷ NELSON, *supra* note 76, at 73.

⁷⁸ See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 337 (1978) (Brennan, J., concurring in part and dissenting in part) (recognizing that discrimination is not a "static" concept, but one that Congress believed should "be shaped by experience, administrative necessity, and evolving judicial doctrine").

⁷⁹ Alexander, *supra* note 44, at 219; Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 625–27 (2005) (identifying "work culture as a source of employment discrimination" and proposing a non-legal-rights approach to trigger change in discriminatory work culture).

⁸⁰ Alexander, *supra* note 44, at 153; Green, *supra* note 49, at 108.

⁸¹ Lawrence, *supra* note 45, at 351–52.

In summary, the courts and academy have engaged in a vigorous debate over the meaning of discrimination and equal protection. Those favoring the intent standard argue that a more lenient standard would create innumerable challenges to legitimate and neutral governmental actions, inappropriately impeding its ability to function. Business would suffer the same problems. Thus, neither should be subjected to legal challenge unless they engage in immoral or wrongful conduct, which disparate impact is not. Those opposing the standard find that the foregoing arguments simply misunderstand law and reality. Equal protection and discrimination cannot be fairly defined in the narrow manner in which the Court has chosen. Equal protection encompasses broader concepts that guarantee affirmative protection from inequality. Moreover, even if discrimination were a narrow concept, the current standard fails to account for many racial biases that motivate discriminatory action. The standard's tendency is to reject these otherwise valid claims. The end result is simply to entrench the status quo of inequity.

B. The Public: A Necessary Participant and a Unique Opportunity

Although significantly affecting the lives of so many and structuring the way that government and businesses conduct themselves, the debate over the intent standard has largely occurred solely within the courts and the academy.⁸² Yet, this debate is not merely a technical or legal one, but rather goes to the very core of discrimination. And in so far as equality and discrimination are subject to various and evolving understandings, the question of their core meaning is one inherently related to public norms.⁸³ When the judiciary adopted the intent standard, however, it did so with little explanation or analysis, much less in regard to public norms.⁸⁴ What little discussion the Court offered suggested that it did not appreciate the

⁸² The only significant exception to this has been in employment discrimination, where the concept of disparate impact is more tangible to the average citizen. *See, e.g., Ricci v. DeStefano*, 129 S. Ct. 2658, 2667 (2009) (indicating that the minority firefighters had argued that the disparate impact of a test was unfair and that the test was irrelevant). Yet, even here, it is far from clear that the average person understands the alternative discrimination standards and the full ramifications of them.

⁸³ Derek W. Black, *A Framework for the Next Civil Rights Act: What Tort Concepts Reveal About Goals, Results, and Standards*, 60 RUTGERS L. REV. 259, 267–68 (2008).

⁸⁴ *Washington v. Davis*, 426 U.S. 229, 240 (1976) (providing no rationale for the standard or connecting it to the framers' intent, but rather asserting it had already been adopted as the standard in *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973), even though *Keyes* had provided no significant explanation either); *see also Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) (adopting the intent standard as the sole basis for asserting a claim under Title VI and admitting that "[a]lthough Title VI has often come to this Court, it is fair to say (indeed, perhaps an understatement) that our opinions have not eliminated all uncertainty regarding its commands"); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 n.27 (1978).

ambiguity of the concepts with which it was dealing,⁸⁵ or it was simply confident that it knew exactly what constitutes discrimination.⁸⁶ Either way, the Court substituted its own notion of discrimination for the public's, enshrining a static concept limited to the single form the intent standard represents.

This Article seeks to further the conversation regarding the meaning of race discrimination, which the Court has avoided, by examining the recent public debate surrounding whether a cartoon depicting a policeman shooting a chimp was racially inappropriate. By systematically examining the public's reaction, this Article adds substance and data—rather than just theory—to many scholars' arguments that concepts of race and discrimination are part of the larger social consciousness, not individual predilection. Thus, it also substantiates the argument that subjective individual intentions and motivations cannot be the sole measure of legal discrimination.

Relying on reactions to a cartoon might not be immediately intuitive to some, but it offers deeper insights than any basic poll. First, obtaining an unfiltered response regarding legal standards is difficult as a general matter. Legal standards and concepts are foreign to laymen and require significant explanation and instructions.⁸⁷ Yet offering explanations runs the inherent risk of tainting the responses.⁸⁸ For this very reason, attorneys fight vigorously over jury instructions at the trial level and challenge them on appeal. Second, the problem of obtaining an unfiltered response may be even more difficult in regard to discrimination standards because they are particularly technical, having undergone various statutory changes and judicial interpretations over time.⁸⁹ Finally, discrimination tends to be an emotionally charged subject. In the context of an already complex legal

⁸⁵ Such an approach to race discrimination is both ironic and brazen given that the Court took the exact opposite approach to the question of age discrimination, fully analyzing the meaning of age, including its varying interpretations and applications. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 591, 596–98 (2004) (“Age” is th[e] kind of word” that “has several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation . . .”).

⁸⁶ Black, *supra* note 32, at 563.

⁸⁷ See Jamison Wilcox, *The Craft of Drafting Plain-Language Jury Instructions: A Study of a Sample Pattern Instruction on Obscenity*, 59 TEMP. L.Q. 1159, 1159–61 (1986) (discussing the confusion that jurors face in interpreting jury instructions and the need to make them clearer).

⁸⁸ See *id.* at 1167–68, 1175.

⁸⁹ See Gerrilyn G. Brill, *Instructing the Jury in an Employment Discrimination Case*, 1998 FED. CTS. L. REV. 2, §1.3 (discussing the complexity of employment discrimination standards). Although the Court articulated what appeared to be a clear framework for employment discrimination cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804–05 (1973), that standard has undergone numerous alterations. See, e.g., Civil Rights Act of 1991, 42 U.S.C. § 1981 (2006); *Reeves v. Sanderson*, 530 U.S. 133, 147 (2000) (finding that “it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer’s explanation” after holding in a previous case that proving the falsity of an employer’s explanation did not shift the burden of proof to the defendant or warrant judgment as a matter of law for a plaintiff); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 510–11 (1993).

structure, presenting the issue to laypersons in a way that permits them to make a fair appraisal is difficult.⁹⁰ As scholars suggest, even judges struggle to overcome their own biases in the context of discrimination cases.⁹¹

In contrast, the responses to the cartoon do not involve these problems. The cartoon does not require an explanation to generate interpretations and reactions. In fact, that is the very point. The cartoon standing alone is ambiguous, making no direct reference to race or a particular person. Thus, the observers' responses should more closely reflect their unvarnished beliefs and notions regarding discrimination or the lack thereof. The cartoon also offers a unique opportunity to gauge the public's notion of discrimination without prompting it. With that said, the data in this study and the additional polls upon which it relies were not collected contemporaneously with each observer's initial viewing of the cartoon. Most had probably read articles about the cartoon or read other observers' comments prior to posting their own. Thus, their responses are not scientifically controlled and are subject to a level of bias. Yet, from the perspective of this Article, this type of bias is not entirely problematic because the Article contends that race and discrimination are socially constructed and contingent concepts. Accounting for others' understanding of race and discrimination in arriving at one's own understanding is a natural process. In fact, those who claim to lack any context and speak solely from an individual perspective in regard to race and discrimination may not be entirely credible.

In regard to race, the more significant concern regarding outside influence arises, not from an individual's appreciation of others' opinions, but rather from the awareness or fear that others are evaluating that individual based on his or her response. Given the incredible weight attached to race in our country, individuals might often feel compelled to hide their true feelings and offer responses that they believe are consistent with friends, family, and anyone in the position of judging them. The available anonymity of internet postings and polls, however, presumably minimizes this problem. With no other consequences attached to their responses, individuals are essentially free to respond openly.

The responses themselves suggest this was in fact the case here. Numerous individuals took full advantage of the apparent freedom, providing insightful commentary as to the perceived discriminatory or harmless nature of the cartoon. Most importantly, they did so with a depth that permits analogies and comparisons to current and alternative legal

⁹⁰ As one commentator notes, the issue of employment discrimination is often emotionally charged and makes jury instructions in these cases both very important and difficult to craft in a way that allows the jury to make a fair decision. Brill, *supra* note 89, § 1.2.

⁹¹ See Eastman, *supra* note 53, at 771; Eisenberg & Johnson, *supra* note 54, at 1190.

discrimination standards. None of the foregoing, however, is meant to suggest that a reliable study of public opinion is unnecessary or that such a study would not render results slightly different than those of this Article. In fact, the contrary is surely true, but the reactions to the cartoon nonetheless speak volumes as to whether the public thinks intent is relevant to discrimination and, thus, warrant serious attention.

III. A CASE STUDY OF THE PUBLIC'S REACTION TO A CARTOON

A. *The News Story Behind the Cartoon*

During the fall of 2008 and first months of 2009, the national conversation was almost exclusively focused on the faltering economy and banking system and the need for a federal stimulus package to stabilize them.⁹² President Obama had been at the center of this conversation, calling for a stimulus package months before he even took office and then pressing for its immediate passage once he was inaugurated.⁹³ On February 13, 2009, just under a month after President Obama took office, Congress passed a \$787 billion stimulus package.⁹⁴ The bill was passed with almost the sole support of Democrats; not a single Republican voted for it in the House and only three centrist Republicans voted for it in the Senate.⁹⁵ The bill was, likewise, harshly criticized and opposed by conservative commentators and media.⁹⁶ Some, including Congressman James Clyburn, suggested that this opposition was based not just on the merits of the bill, but on race and a refusal to accept our first African American president.⁹⁷

In the few days between when Congress passed the bill and the President signed it into law, a story about a chimpanzee attacking a woman made the national news.⁹⁸ The victim was visiting a friend who owned an

⁹² Jackie Calmes & Jeff Zeleny, *Obama Vows Swift Action on Vast Stimulus Package*, N.Y. TIMES, Nov. 23, 2008, at A1.

⁹³ *Id.*

⁹⁴ David M. Herszenhorn, *Party Lines Barely Shift as Package Is Approved*, N.Y. TIMES, Feb. 14, 2009, at A15.

⁹⁵ *Id.*

⁹⁶ See, e.g., Justin Quinn, *The 2009 Stimulus Package: A \$787 Billion Horror Story*, ABOUT.COM: U.S. CONSERVATIVE POL. (Feb. 13, 2009), <http://usconservatives.about.com/b/2009/02/13/the-2009-stimulus-package-a-787-billion-horror-story.htm>.

⁹⁷ Page Ivey, *Clyburn: Opposition to Stimulus Is Slap in Face*, HUFFINGTON POST (Feb. 19, 2009), http://www.huffingtonpost.com/2009/02/19/clyburn-opposition-to-sti_n_168450.html; Ron Daniels, *Ignorance, White Rage and Race Fuel Opposition to President Obama*, AFRICAN-AMERICAN NEWS & ISSUES (Sept. 14, 2009), <http://www.aframnews.com/html/interspire/articles/904/1/Ignorance-White-Rage-and-Race-Fuel-Opposition-to-President-Obama/Page1.html>.

⁹⁸ See, e.g., Rich Calder & Rueven Fenton, *Chimpanzee Attacks Woman in Stamford*, N.Y. POST (Feb. 16, 2009, 10:34 PM), http://www.nypost.com/p/news/regional/item_gx8KmHYr7VZ6rATeVtI32Ojsessionid=21AE7621B190005699A95DE8AB26866F; Stephanie Gallman, *Woman's Life in Danger After Chimp Attack*, CNN.COM (Feb. 17, 2009), <http://www.cnn.com/2009/US/02/17/chimp.attack/index.html>.

aging pet chimpanzee.⁹⁹ Without warning, the chimpanzee attacked the visitor, mauling her face and hands.¹⁰⁰ The owner stabbed the chimpanzee with a knife, but was unable to stop the attack.¹⁰¹ The owner then called the police department for help.¹⁰² After the police officers arrived and exited their cars, the chimpanzee directed his aggression toward them, chasing them back into their cars and attacking one car in an attempt to get at the officers inside.¹⁰³ In response, a police officer shot the chimpanzee several times.¹⁰⁴

On February 18, 2009, the day after President Obama signed the stimulus package into law, the *New York Post* printed a cartoon drawn by Sean Delonas.¹⁰⁵ The cartoon depicted what appeared to be a police officer shooting a monkey or chimpanzee while another officer stood behind him saying: "They'll have to find someone else to write the next stimulus bill."¹⁰⁶ A public outcry immediately erupted, as many perceived the cartoon as a racist depiction of President Obama.¹⁰⁷ The *New York Post*'s office was flooded with complaints that called for the newspaper to fire Delonas, issue an apology, or suffer a boycott.¹⁰⁸ Reverend Al Sharpton led a crowd of protestors outside the *Post*'s office, shouting "Boycott the *Post*! Shut it down!"¹⁰⁹

Attempting to diffuse the controversy, the *New York Post* responded with an editorial that stated:

[The cartoon] was meant to mock an ineptly written federal stimulus bill.

Period.

But it has been taken as something else—as a depiction of President Obama, as a thinly veiled expression of racism.

⁹⁹ Calder & Fenton, *supra* note 98; Andy Newman, *Pet Chimp Is Shot to Death After Mauling Woman in Connecticut*, N.Y. TIMES, Feb. 17, 2009, at A30.

¹⁰⁰ Calder & Fenton, *supra* note 98; Gallman, *supra* note 98.

¹⁰¹ Calder & Fenton, *supra* note 98.

¹⁰² Gallman, *supra* note 98.

¹⁰³ Calder & Fenton, *supra* note 98.

¹⁰⁴ *Id.*

¹⁰⁵ Delonas, *supra* note 8.

¹⁰⁶ *Id.*

¹⁰⁷ See, e.g., carmitas, *Dissecting Sean Delonas' NY Post Chimp Cartoon: Is This Shit Racist?*, ZIMBIO (Feb. 18, 2009, 2:35 PM), <http://www.zimbio.com/NY+Post+Chimp+Cartoon/articles/10/Dissecting+Sean+Delonas+NY+Post+Chimp+Cartoon>; Karen Matthews, *NY Post Cartoon of Dead Chimpanzee Stirs Outrage*, FOX NEWS.COM (Feb. 18, 2009), <http://www.foxnews.com/wires/2009Feb18/0,4670,NYPPostCartoon,00.html>.

¹⁰⁸ Christina Boyle et al., *New York Post Offers Half-Hearted Apology for Chimpanzee Cartoon*, N.Y. DAILY NEWS (Feb. 20, 2009, 1:40 AM), http://www.nydailynews.com/ny_local/2009/02/19/2009-02-19_new_york_post_offers_halfhearted_apology.html; Karen Matthews, *NY Post Apologizes to Some over Obama Cartoon*, FOXNEWS.COM (Feb. 19, 2009), <http://www.foxnews.com/wires/2009Feb19/0,4670,NYPPostCartoon,00.html>.

¹⁰⁹ Matthews, *supra* note 108.

This most certainly was not its intent; to those who were offended by the image, we apologize. . . . Sometimes a cartoon is just a cartoon—even as the opportunists seek to make it something else.¹¹⁰

The editor-in-chief of the *Post*, Col Allan, followed up the *Post*'s statement with his own, stating that "[t]he cartoon is a clear parody of a current news event, to wit the shooting of a violent chimpanzee in Connecticut. It broadly mocks Washington's efforts to revive the economy. Again, Al Sharpton reveals himself as nothing more than a publicity opportunist."¹¹¹ Sean Delonas, the cartoonist, also spoke directly to the media, saying:

It's absolutely friggin ridiculous. Do you really think I'm saying Obama should be shot? I didn't see that in the cartoon. The chimpanzee was a major story in the *Post*. Every paper in New York, except *The New York Times*, covered the chimpanzee story. It's just ridiculous. It's about the economic stimulus bill. If you're going to make that about anybody, it would be [House Speaker Nancy] Pelosi, which it's not.¹¹²

Unconvinced, the protests and complaints continued, leading the owner of the newspaper, Rupert Murdoch, to issue an apology, rather than simply a statement. Murdoch stated:

Last week, we made a mistake. We ran a cartoon that offended many people. Today I want to personally apologize to any reader who felt offended, and even insulted.

Over the past couple of days, I have spoken to a number of people and I now better understand the hurt this cartoon has caused. At the same time, I have had conversations with *Post* editors about the situation and I can assure you—without a doubt—that the only intent of that cartoon was to mock a badly written piece of legislation. It was not meant to be racist, but unfortunately, it was interpreted by many as such.¹¹³

In the days and weeks that followed, the public voiced its own opinion regarding the meaning of the cartoon through various outlets, including

¹¹⁰ *That Cartoon*, N.Y. POST, Feb. 20, 2009, at 30.

¹¹¹ *Cartoon Said To Link Obama to Dead Chimp*, MSNBC.COM (Feb. 18, 2009, 4:25 PM), <http://www.msnbc.msn.com/id/29263781/>.

¹¹² Roland S. Martin, *Commentary: NY Post Cartoon Is Racist and Careless*, CNN.COM (Feb. 18, 2009), <http://www.cnn.com/2009/POLITICS/02/18/martin.cartoon/index.html?iref=newssearch>.

¹¹³ Rupert Murdoch, *Statement from Rupert Murdoch*, N.Y. POST, Feb. 24, 2009, at 2.

polls and internet postings.

B. Methodology

This Article analyzes the public's response to the Delonas cartoon, focusing on any insights that response might offer in regard to our social understanding of discrimination and, in particular, the relevance of intent. The first step was to gather data and source material on the public's response. The sources of data were: (1) the written comments that individuals posted on news websites that ran stories or commentaries on the cartoon, and (2) surveys conducted by news or research outlets. The study collected the comments that were posted on news outlet websites as of May 20, 2009.

The second step was to review and assess the written comments based on readers' perceptions of any racial message or intent in the cartoon. Based on this assessment, each posting was identified as falling into one of five categories, which ranged from those who saw absolutely nothing offensive in the cartoon to those who were extremely offended by a perceived racial message. Two categories represent individuals who were not offended by the cartoon, but offered different reasons and levels of defenses. Two other categories of readers were offended, but took differing levels of offense. The remaining category represents a group that did not address whether they were offended.

Respondents falling into the first category (Group One) did not find the cartoon offensive or motivated by race or discrimination. The individuals in this group offered varying reasons for their perception. Some indicated that the cartoon was not racist because there was no explicit reference to race or a human victim in the cartoon.¹¹⁴ They did not connect the cartoon to any outside historical or racial context. Others in this group indicated that, notwithstanding any context to which some might point to connect the cartoon to race, they did not perceive any racist message or intent, but only a cartoon attempting to be funny.¹¹⁵ Others took a factual approach, reasoning that it could not be racist because President Bush had previously been depicted as a monkey.¹¹⁶ Moreover, this particular cartoon was not

¹¹⁴ See, e.g., Okie, *Response to Obama as Chimp Cartoon Blasted*, WASH. TIMES (Feb. 19, 2009), <http://www.washingtontimes.com/news/2009/feb/19/obama-as-chimp-cartoon-blasted/> (comment on file with author) ("Sorry I did not take the cartoon as race based. I took it as 'what were they thinking when plan was written a monkey could do better.' That is not race based. It really never came to mind to put race into monkey cartoons." [sic]).

¹¹⁵ See, e.g., citizen, *Response to Cartoonist Says It Wasn't Racist*, MILWAUKEE-WIS. J. SENTINEL (Feb. 19, 2009, 7:34 PM), <http://www.jsonline.com/blogs/news/39856872.html> ("Perhaps the cartoonist demonstrated poor judgement [sic], but my guess is that he was saying 'even a monkey could've come up with that' in a similar vein to the completely unracist 'Infinite monkey theorem' regarding the works of Shakespeare [sic].").

¹¹⁶ See, e.g., Anonymous, *Response to Times Media Critic Eric Deggans Weighs in on New York Post Cartoon Controversy*, ST. PETERSBURG TIMES (Feb. 19, 2009, 10:53 AM),

even directed at President Obama because Congress, not the President, drafts legislation.¹¹⁷

The second category of respondents (Group Two) indicated that the cartoon might be offensive to some, but they did not personally find it racist or warranting censure. In particular, they reasoned that the cartoon was not intentionally racist or offensive, and any offense that individuals might take was only incidental and minor.¹¹⁸ In short, they evaluated the cartoon not based on its effect on the public, but solely on the cartoonist's intent.

The third category of respondents (Group Three) did not take any position regarding the substance and meaning of the cartoon. Many in this category were dismissive of the issues because the matter involved a cartoon.¹¹⁹ In short, they suggested cartoons cannot be taken seriously and do not merit this level of discussion. Others in this category focused on the fact that the cartoon appeared in the *New York Post*, which they said has a general practice of publishing incendiary and sensational material to generate sales.¹²⁰ Thus, no one should be surprised or offended, as that would simply encourage and justify the *Post*'s practices. Finally, some in this third category indicated that both the effect and intent of the cartoon

<http://www.tampabay.com/features/media/article977184.ece?comments=legacy> ("I thought the cartoon was hilarious, and didn't even think about Obama until I read about the whining. Come on . . . Bush was compared to a chimp for 8 years and he never cried about it."); LoveMuffin, Response to *Chimp Cartoon Makes Murdoch a Chump*, HUFFINGTON POST (Feb. 19, 2009, 5:39 PM), http://www.huffingtonpost.com/michael-wolff/chimp-cartoon-makes-murdo_b_168230.html#comments ("I consider myself very sensitive to racism and I just can't see how this is a case of racism. We've been calling Bush a monkey for years, even prompting people to make collages comparing Bush's facial expressions to those of monkeys. I think this cartoon is clearly making fun of the stimulus bill, not race."); see also Steve Bell, *Macho? Moi?*, THE GUARDIAN, June 12, 2008, available at <http://www.guardian.co.uk/world/cartoon/2008/jun/12/georgebush> (depicting George Bush as a monkey).

¹¹⁷ See, e.g., Hells Kitchen Guy, Response to *Chimp-Stimulus Cartoon Raises Racism Concerns*, N.Y. TIMES CITY ROOM BLOG (Feb. 18, 2009, 12:36 PM), <http://cityroom.blogs.nytimes.com/2009/02/18/chimp-stimulus-cartoon-raises-racism-concerns/?spage=2#comments> ("The Congress is the body shaping the final look/outcome of the bill, not the President. I think Col Allan, editor-in-chief of The Post, is right. People need to stop and think before the[y] start shouting 'Racism!'").

¹¹⁸ See, e.g., Vicious, Response to *New York Post Apologizes for Editorial Cartoon*, TULSA WORLD (Feb. 20, 2009), http://www.tulsaworld.com/news/article.aspx?subjectid=16&articleid=20090220_298_0_NEWYOR913578&archive=yes&allcom=1 ("[P]ersonally, i dont believe racism was the NYPosts intentions. i think the message was meant to be 'the bill was so poorly written, it must have been written by a being of low intelligence . . . ie: a chimpanzee.'" [sic]).

¹¹⁹ See, e.g., firefly, Response to *NY Post Cartoon of Dead Chimpanzee Stirs Outrage*, DAILY HERALD (Feb. 19, 2009, 9:45 AM), <http://www.dailyherald.com/story/comments/?id+273337> ("It was a cartoon, get over it."); MRB, Response to *Chimp-Stimulus Cartoon Raises Racism Concerns*, N.Y. TIMES CITY ROOM BLOG (Feb. 18, 2009, 12:55 PM), <http://cityroom.blogs.nytimes.com/2009/02/18/chimp-stimulus-cartoon-raises-racism-concerns/?spage=2#comments> ("How sad to see so many people here with nothing better to do than get outraged over a stupid cartoon. . . . Lighten up, Times readers. This is pathetic.").

¹²⁰ See, e.g., Monica, Response to *A Questionable Cartoon*, BOS. GLOBE (Feb. 18, 2009, 1:06 PM), http://www.boston.com/news/politics/politicalintelligence/2009/02/a_questionable.html ("The New York Post has always tried to stir [sic] up trouble to have more people read their [sic] paper. Look what they caused and how people are behaving.").

are irrelevant because principles of freedom of speech guarantee the *Post* and its cartoonist the right to convey any message that they wish.¹²¹ Consequently, these respondents did not address any other underlying issues.

The fourth category of respondents (Group Four) perceived the cartoon to have a racist impact or message. They, however, either were not sure or did not believe that the cartoonist intended this message. Although they took some offense to the cartoon, the absence of clear intent moderated the level of offense they experienced.¹²²

The fifth category of respondents (Group Five) was extremely offended by the cartoon. These readers believed that either the cartoonist was intentionally conveying a racist message or that, even if he did not have this intent, the editors should have realized the racist message.¹²³ In short, regardless of intent, the message was racist and highly offensive to these readers.

In total, these written comments were more informative than any poll, as they included the depth necessary to relate them to larger questions. Relying on this source of data, however, posed two significant problems. First, with depth came a diversity and variance in responses, which made systemizing and categorizing the responses a challenge. Some respondents' comments were contradictory or unclear, making it difficult to determine in which particular category they belonged. Even when a respondent's comments were seemingly clear, the possibility of misinterpreting a reader's comments always exists. The only potential cure, given the scope of this Article, was consistency in evaluating the responses.

The second problem related to the websites on which responses might be found. Certain websites and news outlets may cater to individuals who tend to espouse certain views. Consequently, responses on such websites alone would not fairly represent the general population. Yet, neither could such websites be ignored, particularly if they tended to generate the most responses. The obvious solution was to collect a large sample, but given

¹²¹ See, e.g., lovable liberal, Response to *A Questionable Cartoon*, BOS. GLOBE (Feb. 19, 2009, 8:08 PM), http://www.boston.com/news/politics/politicalintelligence/2009/02/a_questionable.html ("No, sorry, as ugly as this cartoon is, it's protected by the First Amendment—and it ought to be.").

¹²² See, e.g., Jason, Response to *A Racist Cartoon?*, L.A. TIMES (Feb. 19, 2009, 3:23 PM), <http://opinion.latimes.com/opinionla/2009/02/a-racist-cartoo/comments/page/2/#comments> ("Racist? Maybe. Tasteless? Certainly. Funny? Definitely. People need to lighten up and realize that race and our differences will always be something people find humorous (in private And [sic] public circumstances). How many people saw the cartoon and chuckled? Thousands. How many people saw the cartoon and were outraged? Thousands, Everything [sic] is strictly a matter of opinion.").

¹²³ See, e.g., Tony the Tiger, Response to *Chimp-Stimulus Cartoon Raises Racism Concerns*, N.Y. TIMES CITY ROOM BLOG (Feb. 18, 2009, 12:21 PM), <http://cityroom.blogs.nytimes.com/2009/02/18/chimp-stimulus-cartoon-raises-racism-concerns/?page=2#comments> ("How can the New York Post continue to offend large groups of its readers by continuing to post Mr. Delonas' cartoons? They need to stop providing Mr. Delonas with a forum . . .").

the expanse of the internet, the sample itself could be overwhelming. Ultimately, I decided in advance to collect responses from all of the major national newspapers and internet news sources and to collect responses from at least one regional newspaper in each of the nation's regions. When the actual collection began, however, I found that the entire data available was much smaller than anticipated. Not all national newspapers ran a story, much less their own story, on the cartoon.¹²⁴ As a result, many national sources lacked any written comments by readers. Second, to the extent regional newspapers even ran a story, it was often an Associated Press story, rather than one written by their own staff.¹²⁵ In the absence of a story written by a newspaper's own staff, the public rarely posted comments.¹²⁶ In short, far fewer written responses were posted than the study had anticipated. The result was both positive and negative. The positive was that rather than just taking a sample of the available data, the study collected responses from most of the locations that contained any more than just a few random comments. Thus, the study approached a complete review of the data.¹²⁷ The negative was that there was simply less data than I would have preferred.

¹²⁴ For instance, the *Chicago Tribune* did not report on the actual story, but merely ran an editorial discussing the public's response to the cartoon and the editorial posting online did not offer readers a chance to comment or respond. See Clarence Page, *At Least the "Chimp" Cartoon Got Us Talking*, CHI. TRIBUNE, Feb. 22, 2009, at 28.

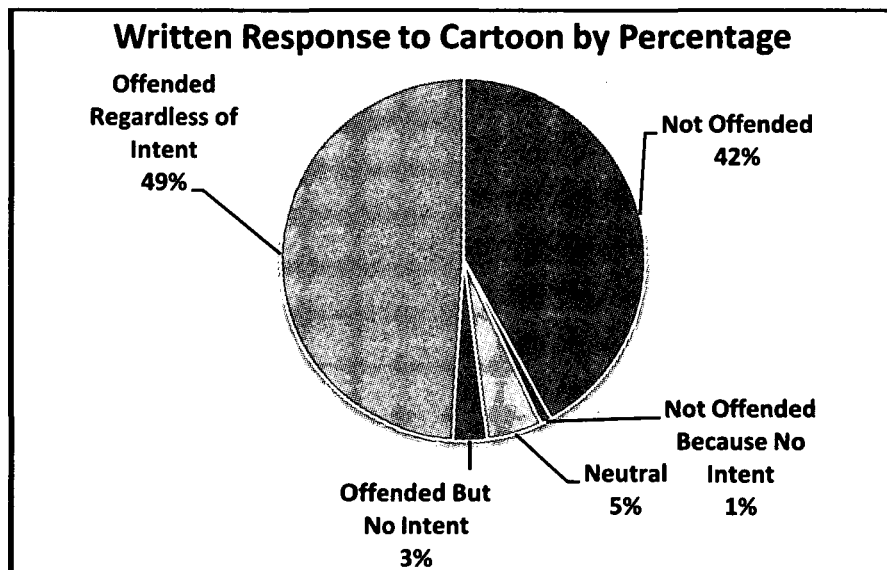
¹²⁵ See, e.g., *NY Post Cartoon of Dead Chimpanzee Stirs Outrage*, DAILY HERALD, Feb. 18, 2009, available at <http://www.dailyherald.com/story/?id=273337#storycomments>; *N.Y. Post Cartoon of Dead Chimpanzee Stirs Outrage*, USA TODAY, Feb. 19, 2009, available at http://www.usatoday.com/news/nation/2009-02-19-monkey-cartoon_N.htm; *Political Cartoon Featuring Chimp Sparks Protests*, FOXNEWS.COM (Feb. 18, 2009), <http://www.foxnews.com/politics/2009/02/18/political-cartoon-featuring-chimp-sparks-protests>.

¹²⁶ Compare *Political Cartoon Featuring Chimp Sparks Protests*, *supra* note 125 (generating 14 total responses) with Foon Rhee, *A Questionable Cartoon*, BOS. GLOBE, Feb. 18, 2009, http://www.boston.com/news/politics/politicalintelligence/2009/02/a_questionable.html (generating 187 responses).

¹²⁷ The stories that the study draws upon include Sylvester Brown, Jr., *Was the Chimp Cartoonist a Victim of Subconscious Indoctrination?*, ST. LOUIS POST-DISPATCH, Feb. 19, 2009, available at <http://www.stltoday.com/blogzone/a-conversation-about-race/general-news/2009/02/was-the-chimp-cartoonist-a-victim-of-subconscious-indoctrination>; Jennifer Harper, *Cartoon Wars Erupt Anew; Image of Slain Chimp Seen as an Obama Slight*, WASH. TIMES, Feb. 19, 2009, at A03; Eugene Kane, *Cartoonist Says It Wasn't Racist*, MILWAUKEE-WIS. J. SENTINEL, Feb. 19, 2009, available at <http://www.jsonline.com/blogs/news/39856872.html>; Tony Norman, *Don't Shoot the Cartoonist, Fellow Cowards*, PITTSBURG POST-GAZETTE, Feb. 20, 2009, at A-2; *N.Y. Post Cartoon of Dead Chimpanzee Stirs Outrage*, *supra* note 125; Opinion, *A Racist Cartoon?*, L.A. TIMES, Feb. 19, 2009, available at <http://opinion.latimes.com/opinionla/2009/02/a-racist-cartoo.html>; Kathleen Parker, *Outrage over Cartoon Chimp Outweighs its Level of Offense*, SACRAMENTO BEE, Feb. 25, 2009, at A19; Rhee, *supra* note 126; *Political Cartoon Featuring Chimp Sparks Protests*, *supra* note 125; Dawn Turner Trice, *On Different Pages When It Comes to Race*, CHI. TRIB., Feb. 23, 2009, at C13; Jeff Yang, *Monkey Business*, S.F. CHRON., Feb. 25, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2009/02/25/apop022509.DTL>; Chris Marsh, *Monkeys, Presidents and Racism*, AZCENTRAL.COM BLOG (Feb. 19, 2009, 12:48 PM), <http://www.azcentral.com/members/Blog/ChrisMarsh/46606>; Martin, *supra* note 112; Leonard Pitts, Jr., *Of Chimps and Chumps*, OREGONLIVE.COM (Feb. 25, 2009), http://www.oregonlive.com/opinion/index.ssf/2009/02/of_chimps_and_chumps.html.

C. The Results

As of May 20, 2009, the study collected a total of 1,697 written responses from internet websites. The largest number of respondents fell into the Group Five, which found the cartoon highly offensive or racist, regardless of intent. With 767 responses to this effect, this group constituted forty-nine percent of the total responses.¹²⁸ The next largest number of respondents fell into Group One, not finding the cartoon offensive or racist. With 654 responses to this effect, this group constituted forty-two percent of the total. The three other categories garnered only a small percentage of the total responses. Even combining these groups, they amounted to less than ten percent of the total responses. The group that simply dismissed the cartoon or had a neutral impression of it was five percent of the total. Those who perceived a racist impact or message in the cartoon, but were not highly offended because the cartoonist may not have intended it, represented only three percent of the total. Those who accepted that the cartoon might be offensive to others, but did not find it personally offensive or warranting any level of censure amounted to only one percent of the total. Although the study attempted to avoid simplifying respondents' positions, after they were categorized, Group One was combined with Group Two and Group Four with Group Five to also answer the basic question of whether the cartoon was racially offensive. Combining the groups, fifty-two percent found the cartoon racially offensive, while forty-three percent did not.



¹²⁸ For a full table of the collected responses, see Appendix.

This study's overall results were generally consistent with other polls and surveys.¹²⁹ The most significant difference from other polls was that the polls limited respondents' options to that of finding offense or no offense. They did not have a middle category that was unsure or thought that other issues were more important. Interestingly, the group that might have otherwise been in the middle in those polls did not appear to evenly divide themselves between those taking offense and those not. Rather, in comparison to the written responses, the middle group in the other polls either did not vote or tended to find the cartoon offensive, as the percentage finding the cartoon not offensive in the polls was similar to the percentage in the written responses, but the percentage finding it offensive jumped more significantly in the polls.

Although small in scope, fifty-nine percent of respondents in a poll conducted by the online magazine *Zimbio* indicated that the cartoon was offensive while forty-one percent did not find it offensive.¹³⁰ A poll by the *Cleveland Plain Dealer* garnered over 1,750 responses, with forty-two percent finding the cartoon intentionally racist, and another twelve percent finding it offensive, but allowing that the offense may have been unintentional.¹³¹ Only thirty-four percent indicated the cartoon did not have anything to do with Obama.¹³² An additional nine percent indicated that, although they did not find it offensive personally, they saw how others could.¹³³ In total, fifty-four percent found the cartoon offensive and forty-three percent did not. A *Philadelphia Inquirer* poll garnered a similar number of total responses,¹³⁴ but unlike the *Cleveland Plain Dealer*, did not offer readers the chance to respond with any nuance. Just asking the basic question of whether respondents thought the cartoon was racist, fifty-three percent in the *Philadelphia Inquirer* poll indicated that it was and forty-seven percent indicated it was not.¹³⁵

¹²⁹ See, e.g., JJ, *Is the NY Post Chimp Cartoon Racist?*, ZIMBIO (Feb. 18, 2009, 3:45 PM), <http://www.zimbio.com/NY+Post+Chimp+Cartoon/polls/1/results/NY+Post+Chimp+Cartoon+racist>.

¹³⁰ *Id.* (collecting sixty-four votes).

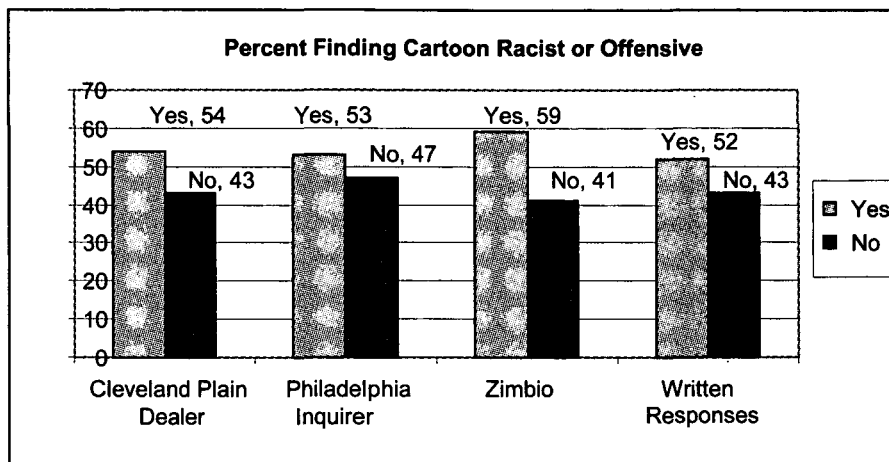
¹³¹ Gloria Millner, *The New York Post's Chimpanzee Cartoon: Do You Think It's Racist?*, CLEVELAND.COM (Feb. 18, 2009, 3:37 PM), http://blog.cleveland.com/openers/2009/02/new_york_post_cartoon_seems_to.html.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Online Poll, *Was the Delonas Cartoon Offensive?*, PHILA. INQUIRER (on file with author; no longer available online).

¹³⁵ *Id.*



The most sophisticated survey was conducted by HCD Research, which polled a nationally representative cross-section of Democrats, Republicans, and Independents. In total, sixty-one percent of respondents thought the cartoon was directed at President Obama.¹³⁶ This perception was most prevalent among Democrats at seventy-three percent,¹³⁷ but fifty-nine percent of Republicans also thought the cartoon was directed at Obama.¹³⁸ Unlike the other surveys, however, HCD Research did not explicitly frame the question in terms of race, but rather asked whether the cartoon was politically incorrect.¹³⁹ Seventy-nine percent of Democrats thought it was politically incorrect, as well as fifty-one percent of Republicans.¹⁴⁰ Overall, sixty-three percent thought it was politically incorrect.¹⁴¹ It then gave these respondents the option of selecting from seven different ways in which it might be politically incorrect. Seventy-one percent of these indicated that it was racially inappropriate.¹⁴² The poll also queried respondents as to who “should be responsible for dealing with the repercussions and backlash that erupted after the publishing of this political cartoon?”¹⁴³ Only forty-five percent thought the cartoonist should be responsible, while strong majorities thought that both the editors and the *New York Post* itself should be held responsible.¹⁴⁴

¹³⁶ Press Release, Holistic Commc’ns Decisions, All Political Parties Agree that NY Post Political Cartoon Was Racist (Feb. 24, 2009), <http://www.hcdi.net/News/MediacurvesRelease.cfm?M=265>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

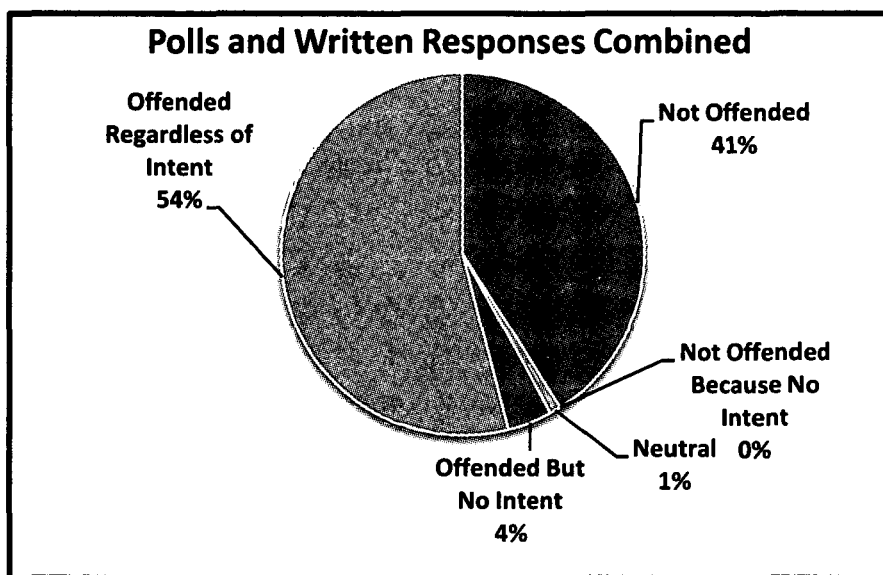
¹⁴¹ HCD RESEARCH, <http://www.mediacurves.com/pdf/ReportJ7284.pdf> (last visited Oct. 6, 2010).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

In total, 5,075 individuals responded to the cartoon through either a poll or a website reviewed by this study. For purposes of rough global estimate, the study combined all respondents into a single chart.¹⁴⁵ Group Five, which found the cartoon highly offensive or racist regardless of intent, remained the largest, constituting fifty-three percent of the total responses. Group One, which did not find the cartoon to be racist or offensive, remained the next largest group, constituting forty-one percent of the total responses. The only other group garnering any significant percentage was the one that perceived a racist impact or message, but did not find it highly offensive because the cartoonist may not have intended it. This group represented only four percent of the total. Those who accepted that the cartoon might be offensive, but did not find it offensive themselves amounted to less than one percent of the total. Combining Group One with Group Two and Group Four with Group Five, the total internet responses indicate that forty-one percent did not think the cartoon was offensive while fifty-seven percent found that it was offensive.¹⁴⁶



D. *A Focus on Effects over Intent*

The varying responses to the cartoon, while not uniform across the polls and written comments, followed a consistent pattern. First,

¹⁴⁵ Combining the respondents into a single chart is truly only for the purposes of a rough global estimate because some of the polls did not include all five categories and, thus, respondents in those polls necessarily fell in group one or four when combined with the others.

¹⁴⁶ Of course, those who were dismissive of, or neutral toward, the cartoon were only accounted for in the written responses and, thus, not fairly measurable in relation to the polls collectively.

regardless of how the question was phrased or responses categorized, a strong majority found the cartoon offensive. The only arguable exception was with the written comments, but there, a significant number of respondents did not take a position on whether the cartoon was offensive. Among those who took a position, nearly fifty-five percent found it offensive while only forty-five percent did not. Second, when respondents were given an option beyond just indicating whether the cartoon was or was not offensive, the perception of a racial message was overwhelming. Putting aside the question of whether someone was personally offended, those who could perceive race or understand how someone might be offended constituted nearly sixty percent of the written responses and sixty-five percent in the *Cleveland Plain Dealer's* poll. Thus, those who entirely overlooked or rejected a racial message in the cartoon were a significant minority.

Beyond the numbers, the written comments provide even further insight into the public's perception of the cartoon. In particular, those who did not find the cartoon offensive offered diverse reasons for their position. For instance, some took the approach of apologists who felt it necessary to defend the cartoon with all plausible arguments, including, as discussed earlier, formalist arguments that focused on the fact that Congress rather than the President writes legislation and that George W. Bush had also been compared to a monkey during his presidency.¹⁴⁷ Some of these defenses did not necessarily reject the notion that someone could have interpreted a racial message; rather, their point was that such an interpretation is incorrect.¹⁴⁸ In effect, apologists of this sort rejected the notion that context, culture, or history matter. For them, the cartoon should

¹⁴⁷ See, e.g., Hells Kitchen Guy, Response to *Chimp-Stimulus Cartoon Raises Racism Concerns*, N.Y. TIMES CITY ROOM BLOG (Feb. 18, 2009, 12:36 PM), <http://cityroom.blogs.nytimes.com/2009/02/18/chimp-stimulus-cartoon-raises-racism-concerns/?spage=2#comments> ("The Congress is the body shaping the final look/outcome of the bill, not the President. I think Col Allan, editor-in-chief of The Post, is right. People need to stop and think before the[y] start shouting 'Racism!'"); Lee, Response to *Commentary: NY Post Cartoon Is Racist and Careless*, CNN.COM (Feb. 18, 2009), <http://www.cnn.com/2009/POLITICS/02/18/martin.cartoon/index.html?iref=newssearch> (comment on file with author) ("There was no outcry when Bush was caricature as a Dufuss. Or the kid from 'Mad' Magazine? How about cartoon poking fun of Christian?" [sic]).

¹⁴⁸ See, e.g., kf2001, Response to *New York Post Apologizes for Editorial Cartoon*, TULSA WORLD (Feb. 20, 2009), http://www.tulsaworld.com/news/article.aspx?subjectid=16&articleid=20090220_298_0_NEWYOR913578&archive=yes&allcom=1 ("The cartoon wasn't funny. Period. However, I don't look for racism or a reason to think others are racist and therefore didn't see some grand insult against Obama or me since I happen to be black. Americans of every color voted for this Obama and he is our president. Let's focus on rebuilding and revitalizing our country . . . no matter what color you are!"); mitchgat, Response to *Cartoonist Says It Wasn't Racist*, MILWAUKEE-WIS. J. SENTINEL (Feb. 19, 2009, 1:47 PM), <http://www.jsonline.com/blogs/news/39856872.html> ("We MUST be careful not to abuse the usage of the word racist. . . . Call this what it really is: insensitive to racial stereotypes. Not acceptable but a far cry from being racist. The intention of the artist was to perhaps shock but more than likely, he was using a current event to demonstrate his opinion. I am not defending him[,] but stupidity and making a poor (I think unintentional [sic]) choice, is (in most cases) not a sin.").

be evaluated solely on its face, or in a vacuum. This very point, however, reveals a significant divergence from some others who defended the cartoon. Another group of defenders, albeit much smaller, did not reject context at all. That the cartoon was referencing President Obama or conveying anything beyond its facial depiction did not occur to them.¹⁴⁹

These differing defenses and perceptions of these two groups raise an issue at the core of race and discrimination: whether race and discrimination have fixed meanings or are social constructs. As discussed earlier, the literature on this point concludes that race and discrimination only have the meanings that society gives them.¹⁵⁰ For instance, Charles Lawrence argues that a racist “message obtains its shameful meaning from the historical and cultural context in which it is used and, ultimately, from the way it is interpreted by those who witness it.”¹⁵¹ Robin Lenhardt, likewise, indicates that race and its discriminatory impacts derive from the consensual meanings that communities share.¹⁵² Thus, it is only this larger context that allows us to distinguish between discriminatory and non-discriminatory conduct. Without context, we misidentify some acts as discriminatory and trivialize others that are in fact discriminatory.¹⁵³ In short, the foundation of race and discrimination is their context, and, without it, they have no objective meaning.¹⁵⁴

The cartoon and many of the written responses to it bear this point out exactly. Without a larger context, the cartoon on its face is nothing but a monkey and a reference to current legislation. An individual who did not understand the political context regarding the stimulus bill might struggle to derive any meaning from the cartoon. For such an individual, the cartoon would, at most, convey a general statement regarding the lack of intelligence that most legislation represents, but not necessarily a specific attack on the stimulus bill. No readers, however, seemed unable to draw the connection to the wrangling over the stimulus bill, as it had been in the news headlines for months and the cartoon was timely in responding to the bill’s passage.

The written responses, however, revealed a serious interpretative gap in regard to the ape. That gap arose directly from individuals’ differing

¹⁴⁹ See, e.g., Tiffanyc, Response to *Commentary: NY Post Cartoon Is Racist and Careless*, CNN.COM (Feb. 18, 2009), <http://www.cnn.com/2009/POLITICS/02/18/martin.cartoon/index.html?iref=newssearch> (comment on file with author) (“I had no idea that if I drew a chimp, gorilla or anything similar that I would be called a racist. Now that I’m aware, I will be more sensitive to the issue. However, monkey’s [sic] are used ALL the time to represent silly, child-like behavior. If I had seen the cartoon before reading this article, I would have assumed the police were shooting the people who wrote the bill. Which was not Obama. Why take offense to THIS monkey?”).

¹⁵⁰ See *supra* notes 44–45 and accompanying text.

¹⁵¹ Lawrence, *supra* note 45, at 351.

¹⁵² R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 823–24 (2004).

¹⁵³ *Id.* at 875–77.

¹⁵⁴ *Id.* at 877 (concluding that the risk of stigmatization is being examined in a vacuum).

knowledge and appreciation of our historical and cultural context. As discussed above, popular culture has in the past routinely depicted African Americans as primates in the effort to demean them. Those who took offense to the cartoon most often did so because they saw the cartoon as perpetuating the historical association between African Americans and primates.¹⁵⁵ They drew upon their personal experiences and cultural knowledge to immediately link the cartoon with Obama. The cartoon standing alone was ambiguous, but historical associations eliminated the ambiguity for them. Moreover, for them, this historical context was so powerful that no formalistic reasoning regarding who writes legislation could change the message they interpreted.

Age necessarily plays a significant role in individuals' familiarity with this imagery and its historical context. Some younger individuals did not intuitively connect the cartoon to the President and, for this reason, did not take offense. For them, the cartoon was confusing or unclear. As one educator wrote:

I teach high school social studies and my student population is 95% Native American. Today I've shown three social studies classes the cartoon. Of 79 students (14–17 years old) only 1 student identified a racial component to the cartoon. After explaining some of the concerns regarding the cartoon most students could not acknowledge or comprehend the alleged racism.¹⁵⁶

Those who indicated the cartoon was not offensive, of course, included more than just those who lack the context from which to make inferences about the cartoon. But a careful reading of those defending the cartoon reveals that many of them defended the cartoon by decontextualizing it.¹⁵⁷

¹⁵⁵ See, e.g., Dhoff, Response to *A Questionable Cartoon*, BOS. GLOBE (Feb. 18, 2009, 12:57 PM), http://www.boston.com/news/politics/politicalintelligence/2009/02/a_questionable.html ("Regardless if you feel as though this cartoon is inappropriate [sic] or not, you can not ignore the racist undertones of comparing African Americans to monkeys. This comparison WAS a part of this country's history and an ugly part at that. To create (the illustrator) or to publish (the editors) a cartoon with such undertone is irresponsible and ignorant. Americans come in different shapes, colors, religions, races and sensitivity levels. At some point, we need to be mindful of these sensitivity levels and stop turning a blind eye towards it."); telecasterplayer, Response to *NY Post Cartoon of Dêad Chimpanzee Stirs Outrage*, DAILY HERALD (Feb. 19, 2009, 11:12 AM), <http://www.dailyherald.com/story/comments/?id+273337> ("It was ignorance plain and simple. This country's history with race is not secret, and mainstream comics as recently as the beginning of the 20th century frequently portrayed African Americans as simians. It's in all of the history books.").

¹⁵⁶ Martin, *supra* note 112.

¹⁵⁷ fredlet, Response to *Monkey Business*, S.F. CHRON. (Feb. 25, 2009, 4:58 PM), <http://www.sfgate.com/cgi-bin/article/comments/view?f=/g/a/2009/02/25/apop022509.DTL&plckOnPage=2&plckItemsPerPage=10&plckSort=TimeStampDescending> ("There is no denying that we still have racism within the human race, but the arguments that are used to point out this cartoon as a racist one seem weak to me and the issue trumped up. The fact that W [George W. Bush] was frequently compared to a chimpanzee also weakens their supporting arguments. My first impression was that the author was stating that any monkey can do a politician's job and that the stimulus bill was badly written

They implicitly rejected the relevance of context in interpreting the cartoon, including the historical portrayals of African Americans as apes, by interpreting it in isolation. For instance, one respondent wrote, "I'm very sympathetic towards the 'racist past' you speak of Mr. Martin, but maybe the 'lens' with which you see through is to blame and not the image itself."¹⁵⁸ Those rejecting context, however, constituted a clear minority. The overwhelming majority derived their understanding of the cartoon almost exclusively from its context.

These varying reactions to the cartoon only reaffirm scholars' insights regarding the cultural contingency of race and discrimination. When the cartoon is disconnected from our cultural and historical experience, it loses meaning. Without any personal understanding of that experience, individuals find it hard to comprehend messages that are obvious to others. As a practical matter, one could try to communicate a racist message, but fail miserably if the recipient did not share the cultural understandings upon which the message is based. Likewise, one could intend to send a harmless message, but nonetheless send a racist message because how the message will be interpreted is not entirely within the control of the author. In short, whether a message or action is discriminatory is, in many respects, culturally contingent.

In addition to the cultural contingency of discrimination, the responses raised important questions regarding the relevance of intent. Are the impact and meaning of messages or actions dictated solely by social perceptions? Is the harmful impact of one's actions negated if one's intent is innocent? Does a harmful impact become a little worse or better depending on whether an actor's intent is malevolent or innocent? The polls that only offered respondents two choices provided no insight into these questions, but the others, along with the written responses, spoke directly to these questions.

The largest group, constituting more than half of all respondents, indicated that it was seriously offended by the cartoon regardless of the cartoonist's intent. Many in this group, however, added that they thought Delonas intended to convey a racial message and, thus, their responses

... but I guess that just shows my prejudice against politicians ..."); oblique, Response to *Monkey Business*, S.F. CHRON. (Feb. 25, 2009, 5:56 PM), <http://www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2009/02/25/apop022509.DTL> ("For years, George Bush was directly compared to Curious George the Monkey. . . . President Obama is not going to make everyone happy and when he makes an unpopular decision he's going to get criticism. If he can't handle that heat, he needs to resign the job to someone who can. If he gets compared to a monkey—so what? That comparison has a precedent, thanks to Curious George. All the whiners need to grow up and stop playing the race card. That card is tired.").

¹⁵⁸ John, Response to *Commentary: NY Post Cartoon Is Racist and Careless*, CNN.COM (Feb. 18, 2009), <http://www.cnn.com/2009/POLITICS/02/18/martin.cartoon/index.html?iref=allsearch>.

regarding the relevance of intent may be overstated.¹⁵⁹ Nevertheless, this group, as a whole, expressed the notion that race and discrimination are culturally contingent social constructs. They are not defined by the message one intends to convey, but rather by the context in which they occur. Thus, in the instant case, the cartoonist cannot presume to act in a vacuum, nor control his message once it is released. Some respondents further indicated that the cartoonist was bound to apprise himself of the context and act accordingly because he is responsible for the results of his actions.¹⁶⁰

The HCD Research survey results showed an even stronger focus on assigning culpability regardless of intent. HCD's survey, however, did not focus solely upon the cartoonist, but allowed respondents to assign blame to different levels of the *Post*'s staff. Given this option, an overwhelming number of respondents assigned responsibility to the highest levels of the newspapers, finding that the newspaper itself and its editors were at fault.¹⁶¹ Interestingly, because so many focused on the upper levels of the paper, only forty-five percent indicated that the cartoonist himself was responsible. In effect, the respondents were indicating that, even if the cartoonist lacked the intent to offend, it was in fact offensive and his superiors had the obligation to recognize this before printing the cartoon. For these respondents, the effect of the cartoon, rather than the intent, is all that matters; whoever has the final say in an action should be held accountable regardless.

While those who weighed the cartoon based on its contextual effect regardless of intent were the large majority, the cartoonist's intent was relevant to others' responses as well. In particular, the perception of the cartoon turned almost entirely upon intent for those in Groups Two and Four, which together comprised about five percent of the total respondents. Both of these groups thought the cartoonist lacked the intent to offend, but they split as to whether the lack of intent outweighed any racial message in

¹⁵⁹ See, e.g., Mark Stave, Response to *A Racist Cartoon?*, L.A. TIMES (Feb. 19, 2009, 5:15 PM), <http://opinion.latimes.com/opinionla/2009/02/a-racist-cartoo/comments/page/1/#comments> ("The author of the cartoon is a graphic artist, presumably versed in the language of images. This person chose to use the image of a monkey. That visual image speaks clearly to those who already refers [sic] to Blacks as monkey, as well as to anyone familiar with the visual language of American racism. The publishing of the cartoon may be more oriented along a profit motive, but innocence of the connotations seems very unlikely.").

¹⁶⁰ See, e.g., ten10tothe28, Response to *Monkey Business*, S.F. CHRON. (Feb. 25, 2009, 4:23 PM), <http://www.sfgate.com/cgi-bin/article/comments/view?f=/g/a/2009/02/25/apop022509.DTL&plckOnPage=3&plckItemsPerPage=10&plckSort=TimeStampDescending> ("Cultural sensitivity is real simple. Just ask yourself how you think your audience will receive your juvenile, stereotypical and racist attempt at exercising your right to free speech. If you can imagine someone in the target group of your caricature being offended by the caricature you are making, then it is in fact offensive. How could anyone responsible for the cartoon depicting Obama as a Chimp who got shot not understand that the caricature could be received as insulting and even racist?").

¹⁶¹ Press Release, *supra* note 136.

the cartoon. Respondents in Group Four did not think the lack of intent excused the racial message, but did allow that the absence of intent mitigated the ultimate effect of the cartoon. Consequently, they found the cartoon only moderately offensive. In contrast, Group Two indicated that, although the cartoon might be offensive to some, the lack of intent largely eliminated the problem. In effect, individuals could understandably take offense, but the cartoonist is not responsible because he lacked intent.

The only group that consistently failed to address the relevance, or irrelevance, of intent was Group One, the group that steadfastly defended the cartoon. Most in this group did not broach the issue of intent simply because it was not relevant to the points they made.¹⁶² Most defended the cartoon because they did not perceive a racial message or thought such a message was contrary to the facts.¹⁶³ Given these defenses, one could fairly assume that these respondents thought the cartoonist lacked any discriminatory intent. Nevertheless, with the exception of a few, those in this group did not base their defense of the cartoon on the notion that the cartoonist lacked intent.¹⁶⁴ Thus, their comments do not add much to an assessment of the relevance of intent.

In summary, the data reveals two significant points about intent and effect. First, the majority of the public found the cartoon offensive because of its cultural message, not its intent. Even if the cartoonist's intent was innocent, the cartoon sent unacceptable racial messages. Beyond this group, no other large consistent stance regarding intent emerged. Those outside the majority splintered into varying smaller groups, some finding that innocent intent excused the cartoon, others finding innocent intent mitigated the cartoon's effect to some extent, and others simply ignoring

¹⁶² See, e.g., JRyan, Response to *Commentary: NY Post Cartoon Is Racist and Careless*, CNN.COM (Feb. 18, 2009), <http://www.cnn.com/2009/POLITICS/02/18/martin.cartoon/index.html?iref=newssearch> (comment on file with author) ("It's a dumb cartoon, I disagree with its message (such as it is) but honestly doubt the cartoonist's intent was racist. The takeaway is: 'the stimulus bill is so bad, it might as well have been drafted by a monkey.' If the cartoonist had wanted to convey the idea that 'Obama is a monkey,' he would have had any number of caricaturist's tools at his disposal to do so: putting a suit and tie on the chimp, making the animal's face resemble O's etc, etc. That he didn't do any of these things tells me that wasn't his intent. So my verdict is: Lame—YES, Insensitive to possible interpretations—YES, Intentionally racist—NO." [sic]).

¹⁶³ See, e.g., Kiah, Response to *Commentary: NY Post Cartoon Is Racist and Careless*, CNN.COM (Feb. 23, 2009), <http://www.cnn.com/2009/POLITICS/02/18/martin.cartoon/index.html?iref=allsearch> ("I don't think this particular drawing was meant to be racist because of the events of the chimp behind it. I think mon[k]eys might be smarter about a stimulus bill than the idiots in washington. George Bush which I don't care for was drawn in the images of a mon[k]ey all the time and nobody cared." [sic]).

¹⁶⁴ For an example of a defense based on intent, see shredder_01, Response to *Monkey Business*, S.F. CHRON. (Feb. 25, 2009, 12:26 PM), <http://www.sfgate.com/cgi-bin/article/comments/view?f=/g/a/2009/02/25/apop022509.DTL&plckOnPage=5&plckItemsPerPage=10&plckSort=TimeStampDescending> ("I think all you people who are so upset over this cartoon need to get a firmer grip on reality. Fact is that this is not a racist depiction of Barack Obama, it is a pointed swipe at his administration and nothing more. . . . I am sorry for all of those that want to find racism under every rock and around every corner, but in my opinion there really was no intent to be racist here.").

intent because they thought the cartoon was not racial. Second, putting aside the significance of intent in measuring offense, the notion that, as a matter of fact, the cartoonist did not intend to be offensive, was present to some extent in almost every group that responded. Many who objected to the cartoon thought the cartoonist intended a racial message, but many of those who were offended also allowed that he may not have intended the message; they simply did not think the lack of intent mattered. And, of course, the lack of intent is consistent with a core factor for all other groups. Thus, the large majority of respondents thought the cartoonist did not intend to be offensive, but a nearly equal large majority across all of the polls and responses still found the cartoon to be inexcusable.

IV. LEGAL IMPLICATIONS OF THE PUBLIC'S REACTION

A. *Correlating Public Opinion with Legal Standards*

Based on the data collected above, most of the general public conceives of discrimination as a broader concept than the courts' current intent standard. While all would agree that intentionally racially biased acts are sufficient to demonstrate discrimination, discrimination is not limited to those acts. Across the board, the majority of respondents reflected the notion that the effect of one's actions is an appropriate measure of discrimination. The more difficult question is what other anti-discrimination standard might be consistent with the broader public understanding of discrimination. At least three categories of alternatives to the intent standard have been used or identified in the past.

First, prior to being overruled, lower courts regularly used a disparate impact or effects tests, under which a *prima facie* case of discrimination was established by showing that a particular policy or practice had a disproportionate effect on a racial group.¹⁶⁵ This standard permitted a plaintiff to assert a claim without demonstrating any intentional bias. A defendant, however, could still avoid liability if it could justify its actions or policy with some legitimate end that made the particular action necessary.¹⁶⁶ Some have advocated for a second alternative that one might

¹⁶⁵ See, e.g., *Quarles v. Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750, 754 (5th Cir. 1989) (allowing a case to proceed under Title VI through a disparate impact analysis); *NAACP v. Med. Ctr., Inc.*, 657 F.2d 1322, 1324 (3d Cir. 1981) ("[D]isparate impacts of a neutral policy may be adequate to establish discrimination under Title VI . . ."); *GI Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 677-79 (W.D. Tex. 2000) (applying a burden shifting disparate impact analysis). The Court in *Alexander v. Sandoval* held no such cause of action existed, nor ever had. 532 U.S. 275, 282-83 (2001). Prior to *Sandoval*, however, lower courts found that *Guardians Ass'n v. Civil Service Commission*, 463 U.S. 582 (1983), had recognized a cause of action for disparate impact. See, e.g., *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 70 (1992); *Alexander v. Choate*, 469 U.S. 287, 292-96 (1985); *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Roberts v. Colo. Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993).

¹⁶⁶ See, e.g., *GI Forum*, 87 F. Supp. 2d at 677.

call pure disparate impact, which would not afford a defendant any excuses. Under such a standard, disparate impact alone is sufficient to justify a remedy. The only legal question is whether the disproportionality is high enough or the cultural perception of the impact consistent enough to label it discriminatory.

The third alternative goes in the opposite direction of a pure disparate impact standard and includes several variants. These variants require some low level of intent or culpability in addition to a discriminatory effect. For instance, some have argued for a standard that imposes liability for disparate impacts only when the defendant has acted negligently in regard to the impacts.¹⁶⁷ In effect, if a defendant should have foreseen the impact in advance and could have avoided it without any unreasonable burden, it would be required to do so.¹⁶⁸ Courts and scholars have explored another variant that would require deliberate indifference to racial impacts rather than just negligence.¹⁶⁹ The standard would prohibit disparate impacts when a defendant knows or should have known of a racially disparate impact, a less harmful and reasonable alternative is available, and either no countervailing interest outweighs the racial harm or the defendant would have acted differently had the harm fallen upon another racial group.¹⁷⁰

The majority of the respondents' reaction to the cartoon is generally consistent with a disparate impact or discriminatory effect standard in some form, but no majority emerged that would clearly support any particular disparate impact variant. The largest coherent group of respondents seemed to support an approach that would strictly prohibit disparate impacts or discriminatory effects. This group rejected the justifications, excuses or explanations for the cartoon, measuring the cartoon solely from its cultural interpretation or effect.¹⁷¹ But again, this group alone was not a majority.

Outside of this group of respondents, the groups were relatively small. Also, given the fine distinctions between the disparate impact variants that

¹⁶⁷ David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 934 (1993).

¹⁶⁸ *Id.* at 969.

¹⁶⁹ See, e.g., *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (applying deliberate indifference to sexual harassment); *Bryant v. Indep. Sch. Dist. No. 1-38*, 334 F.3d 928, 932-34 (10th Cir. 2003); *Horner v. Ky. High Sch. Athletic Assoc.*, 206 F.3d 685, 692-93 (6th Cir. 2000).

¹⁷⁰ Black, *supra* note 32, at 576-77, 579.

¹⁷¹ See, e.g., Dhoff, Response to *A Questionable Cartoon*, BOS. GLOBE (Feb. 18, 2009, 12:57 PM), http://www.boston.com/news/politics/politicalintelligence/2009/02/a_questionable.html ("Regardless if you feel as though this cartoon is inappropriate or not, you cannot ignore the racist undertones of comparing African Americans to monkeys. This comparison WAS a part of this country's history and an ugly part at that. To create (the illustrator) or to publish (the editors) a cartoon with such undertone is irresponsible and ignorant."); Kate, Response to *Chimp-Stimulus Cartoon Raises Racism Concerns*, N.Y. TIMES CITY ROOM BLOG (Feb. 18, 2009, 10:16 PM), <http://cityroom.blogs.nytimes.com/2009/02/19/new-york-post-apologizes-for-chimp-cartoon/?scp=11&sq=obama+chimp+cartoon&st=cse&apage=1#comment-310149> ("History shows that media have used primates to degrade all sorts of groups, including the Irish (quite a long time ago). The purpose is to degrade someone and an entire race, in this case Obama. I don't buy that it's just a cartoon.").

incorporate some level of intent, drawing any firm correlations between a group of respondents and a particular variant would stretch credulity. With that said, the respondents in the smaller groups did express views that were generally consistent with a disparate impact standard that accounts for intent on some level. These smaller groups regularly took into account the intent or rationale behind the cartoon.¹⁷² Thus, their responses were inconsistent with a pure or aggressive disparate impact standard. Instead, these respondents would place significant weight on discriminatory effect, but would excuse or discount that effect under certain circumstances.

For instance, the HCD survey suggested that the public took a more complex approach to evaluating the cartoon, similar to that of a disparate impact standard based either on negligence or deliberate indifference. When queried by HCD regarding who is responsible for the cartoon, a large majority indicated that someone, regardless of who, at the paper should be held responsible, but stark distinctions arose when respondents were given the opportunity to assign that responsibility to particular people or institutions.¹⁷³ Only forty-five percent thought the cartoonist should be responsible, while sixty-one percent thought that the editor who approved the cartoon should be responsible.¹⁷⁴ If a majority was willing to excuse the cartoonist who actually created the inappropriate material, they must have thought the cartoonist lacked the perspective with which to evaluate his own work or that he had benign intentions. Yet, his arguably benign motives did not excuse the editors. The public viewed the higher level employee, or the one who makes the final call, as having an affirmative responsibility to evaluate the cartoon and prevent inappropriate material. In short, the editor either knew, or should have known, of the discriminatory nature of the cartoon, and thus is responsible regardless. This responsibility is similar to what a negligence or deliberate indifference variant would impose.

Ideas consistent with this type of responsibility also appear in the written responses. Some respondents contemplated that the cartoonist may not have intended the cartoon to be offensive, but they argued that he

¹⁷² See, e.g., James FM, Response to *Chimp-Stimulus Cartoon Raises Racism Concerns*, N.Y. TIMES CITY ROOM BLOG (Feb. 18, 2009, 10:40 PM), <http://cityroom.blogs.nytimes.com/2009/02/19/new-york-post-apologizes-for-chimp-cartoon/?scp=11&sq=obama+chimp+cartoon&st=cse&apage=2#comment-310229> ("The NY [P]ost cartoon was more idiotic than racist, the artist and the editor should have known better than to print something like that in the current world we live in."); Jerry, Response to *Chimp-Stimulus Cartoon Raises Racism Concerns*, N.Y. TIMES CITY ROOM BLOG (Feb. 18, 2009, 11:07 PM), <http://cityroom.blogs.nytimes.com/2009/02/19/new-york-post-apologizes-for-chimp-cartoon/?scp=11&sq=obama+chimp+cartoon&st=cse&apage=2#comment-310323> ("The Post misses the point. Before publishing the cartoon, the Post editors should have realized that the cartoon would be regarded as racist, and that should have been the reason why it should not have been published. Saying now that it was not intended as a racist statement doesn't do it. The insensitivity of the Post is the point.").

¹⁷³ Press Release, *supra* note 136.

¹⁷⁴ *Id.*

should have known better.¹⁷⁵ Thus, they still found the cartoon offensive, but only mildly so. Interestingly, the line between these respondents and those who assessed the cartoon solely on its effect blurs when viewed from the perspective of the appropriate legal standard. Those who objected to the cartoon solely based on effect sometimes added that they afforded no excuse to the cartoonist, in part, because he should have known of its effect.¹⁷⁶ Thus, while favoring a pure or aggressive disparate impact standard on the whole, these respondents suggest that a disparate impact standard that places some level of responsibility on individuals to avoid foreseeable racial harms is not inconsistent with their views. Yet, even if one included these respondents among those favoring an impact standard that accounts for a low-level intent, they would be far from sufficient to create a majority.

Given the foregoing nuances, the best one can do is suggest a standard that would be palatable to a majority. Ultimately, a disparate impact standard that accounts for some form of intent is that standard. Those who account for intent in their impact standards would logically reject the notion of basing liability solely upon effect. Thus, while the pure disparate impact group is the largest on its own, this group is also at the end of the ideological spectrum and would be unable to carry a majority. A pure disparate impact standard would be inconsistent with all except the core group supporting it and that group's numbers remain at less than a majority. This core group, however, would presumably see the disparate impact standard that accounts for low-level intent as the closest standard to its own. This group combined with those more directly favoring a disparate impact standard that accounts for intent would amount to a majority.

¹⁷⁵ See, e.g., j, Response to *A Questionable Cartoon*, BOS. GLOBE (Feb. 18, 2009, 12:17 PM), http://www.boston.com/news/politics/politicalintelligence/2009/02/a_questionable.html ("So much for our new, post-racial society. I hope our President handles this latest insult with the grace and charm that he's exhibited on other occasions. A racial firestorm is the last thing this country needs right now. There's too much work left to be done to be distracted by ignorant cartoonists.").

¹⁷⁶ See, e.g., Gutless Oscar, Response to *N.Y. Post Cartoon of Dead Chimpanzee Stirs Outrage*, USA TODAY (Feb. 22, 2009, 3:43 AM), <http://content.usatoday.com/community/comments.aspx?id=34190138.story&p=3> ("The cartoonist should be fired for being brainless, and the editor should be fired for being brainless. The way to be certain that these two clowns are fired is by way of continued protests and boycotting this paper and its advertisers. Bring the heat until they're out. This depiction and the editor's 'ok' to publish it are inexcusable. This printed material cannot be acceptable in 2009."); ten10tothe28, *supra* note 160 ("Cultural sensitivity is real simple. Just ask yourself how you think your audience will receive your juvenile, stereotypical and racist attempt at exercising your right to free speech. If you can imagine someone in the target group of your caricature being offended by the caricature you are making, then it is in fact offensive. How could anyone responsible for the cartoon depicting Obama as a Chimp who got shot not understand that the caricature could be received as insulting and even racist?").

B. *The Relevance of Public Norms to the Law*

While the public's reaction to the cartoon suggests that the courts' current intent standard is inconsistent with majoritarian concepts of race discrimination, to some, it is not immediately obvious that public opinion even matters on this point, particularly in regard to constitutional claims. The Constitution is not subject to public opinion.¹⁷⁷ In the strictest sense, our government and our citizens, where applicable, must bend their actions toward the Constitution's requirements—not the reverse. When the public disagrees with constitutional principles, its only option is to amend the Constitution. That said, constitutional principles do not exist in a vacuum. Rather, the courts apply the Constitution to and within an evolving cultural context. Thus, public norms are necessarily relevant to constitutional application and interpretation.

The relevance of cultural norms and sentiment is clearest in the context of the First Amendment. The First Amendment grants freedom of speech and prohibits the government from establishing religion, but does so in only the most general terms. Thus, the Amendment's language itself provides relatively little assistance in resolving real cases. Decisive questions such as what amounts to speech or an establishment of religion are in many instances heavily dependent on public perceptions. For instance, the Supreme Court has concluded that whether a particular act—as opposed to a verbal statement—expresses an idea that the First Amendment would protect is dependent on how others would perceive the act.¹⁷⁸ Likewise, whether certain government action amounts to an establishment of religion has in some instances depended on whether an objective observer would interpret the action to endorse religion.¹⁷⁹ In short, while the constitutional protections regarding speech and religion are unwavering in principle, the particular protections that these principles afford are dependent on evolving public and cultural understandings.

Although less obvious, the Fourteenth Amendment is no more removed from its cultural context than the First Amendment, particularly in regard to discrimination. Some criticize the Court for its attention to

¹⁷⁷ See, e.g., *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 304–05 (2000) (stating that constitutional rights are not subject to public opinion or vote); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 665–66 (1943) (“One’s conception of the Constitution cannot be severed from one’s conception of a judge’s function in applying it. The Court has no reason for existence if it merely reflects the pressures of the day.”).

¹⁷⁸ See, e.g., *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006).

¹⁷⁹ See, e.g., *Cnty. of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 620 (1989) (relying on a standard that asked whether the objective observer would perceive the government action to be an endorsement of religion); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (same).

context,¹⁸⁰ but the fact remains that context has been crucial to both the Court's best and worst decisions. For instance, in *Plessy v. Ferguson*, the Court addressed whether segregation on train cars violated equal protection.¹⁸¹ To answer the question, the Court relied on social context and the message that the government was or was not sending.¹⁸² Of course, the Court in *Plessy* misinterpreted that message, but the Court used the same attention to context to justify its later holding in *Brown v. Board of Education*.¹⁸³ There, the Court held that school segregation was unconstitutional not because of any tangible inequity in the schools, but because segregation sent a message of African American inferiority.¹⁸⁴ Moreover, this message was conveyed even if the legislature and schools made no explicit reference to purported inferiority of African Americans. What had changed from *Plessy* to *Brown* was not the nature of segregation, but rather the cultural norms regarding the meaning of equality and discrimination.

Even in the language the Court uses to describe members of racial groups, we see that context matters. In the Court's earlier cases, the Court referred to African Americans as "negroes," but later shifted to "black" and more recently to "African American."¹⁸⁵ These changes are responses to society's perception of these labels as appropriate, discriminatory, or non-discriminatory. For instance, referring to African Americans as "colored" would not have been perceived as offensive during much of the twentieth century.¹⁸⁶ In fact, during the early twentieth century, "colored" was a polite or non-discriminatory label for African Americans, and many

¹⁸⁰ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 379–80 (2003) (Rehnquist, J., dissenting) (asserting that the majority had abandoned the normal strict scrutiny standard and applied a lower level of scrutiny based on the unique context of higher education).

¹⁸¹ 163 U.S. 537, 540–42 (1896).

¹⁸² See, e.g., *id.* at 551 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.")

¹⁸³ 347 U.S. 483 (1954).

¹⁸⁴ *Id.* at 494–95.

¹⁸⁵ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 749, 764 (2007) (Thomas, J., concurring) (quoting the word "negro" from many historical decisions, but using "black" or "African American" in his own language); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 469 (1986) (using the term "black"); *Milliken v. Bradley*, 418 U.S. 717, 725 (1974) (referring to African Americans as "negroes").

¹⁸⁶ In fact, the leading civil rights group of the time, the National Association for the Advancement of Colored People, included the term in its name. Langston Hughes contrasted the word "colored" with "nigger," using the former as a standard non-derogatory reference and the latter the opposite. LANGSTON HUGHES, *THE BIG SEA* 268–69 (1940) ("The word *nigger* to colored people of high and low degree is like a red rag to a bull. Used rightly or wrongly, ironically or seriously, of necessity for the sake of realism, or impishly for the sake of comedy, it doesn't matter. Negroes do not like it in any book or play whatsoever, be the book or play ever so sympathetic in its treatment of the basic problems of the race. Even though the book or play is written by a Negro, they still do not like it. The word *nigger*, you see, sums up for us who are colored all the bitter years of insult and struggle in America.").

African Americans referred to themselves with this term.¹⁸⁷ The same is simply not true today.¹⁸⁸ In short, equal protection analysis cannot escape the cultural context that surrounds it; context may not be explicitly determinative for equal protection, but as a practical matter, the law depends on it.

Resolving the question of whether public opinion matters for antidiscrimination statutes is far simpler—the answer must be yes. All of the foregoing points about the cultural contingency of race and discrimination are equally applicable to statutes, but other concrete principles further bind statutory law to public opinion. First, our legislators are entrusted with representing our interests and views. Thus, at least at the time of enacting law, public opinion is at the forefront. Second, civil rights legislation, in particular, is not just a codification of equal protection or an attempt to prohibit criminal, morally culpable, or malevolent conduct.¹⁸⁹ Civil rights legislation is much broader and farther reaching than that. It ultimately broaches the question of how we want to structure society.¹⁹⁰ In that respect, it is no different than negligence, product liability, and other forms of civil liability that attempt to create financial incentives and disincentives to act or not act in a particular manner.¹⁹¹ These incentives and disincentives, however, are not based on any indelible concept of “right” and “wrong” or “fault” and “no-fault.”¹⁹²

¹⁸⁷ *Id.* at 145.

¹⁸⁸ See, e.g., Lindsay Lohan Calls Obama First “Colored President” in Interview, FOXNEWS.COM (Nov. 12, 2008), <http://www.foxnews.com/story/0,2933,450347,00.html> (indicating the term is derogatory and was used by a popular racist figure). But see Mario Sevilla, *Lohan Calls Obama “Colored,” NAACP Says No Big Deal*, A + E INTERACTIVE: BAY AREA ARTS AND ENT. BLOG (Nov. 12, 2008, 2:21 PM), <http://blogs.mercurynews.com/aei/2008/11/12/lohan-calls-obama-colored-naacp-says-no-big-deal/> (quoting the NAACP communications director as saying the term is not derogatory, but outdated).

¹⁸⁹ See Oppenheimer, *supra* note 167, at 970 (critiquing the notion that moral wrongfulness is relevant to discrimination).

¹⁹⁰ Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 219 (1992); Black, *supra* note 32, at 543–44.

¹⁹¹ See, e.g., Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 714 (1965) (“‘[C]ompensation’ as an aim means only that it is deemed more desirable for persons other than the injured to pay the costs of the injury. This is because if many pay the cost of an accident rather than one . . . the social dislocation costs of the accident may be reduced; this is the basis of the theory of loss spreading. . . . For when those who are ‘more able to pay’ pay, we believe that fewer secondary undesirable effects will occur.” (footnotes omitted)); John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 519 (2003) (suggesting that twentieth century changes in tort law were due to political and social influences stemming from a growth in the industrial economy, emphasizing physical injury and deemphasizing traditional torts like trespass); Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1270 (1997) (discussing the competing interests of fairness, loss spreading, deterrence, as well as fairness, social utility and economic efficiency); Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CALIF. L. REV. 2403, 2409–10 (2000) (suggesting that, as a response to increased social concerns for fairness and cost-spreading, the twentieth century saw an increase in the protections and remedies available to negligence victims).

¹⁹² Oliver Wendell Holmes conceded that a “common ground at the bottom of all liability in tort” is “very hard to find.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 77 (Little, Brown and Co.

Rather, these civil liability regimes reflect social policy regarding what is best for society as a whole.¹⁹³ Civil rights legislation, likewise, reflects social values regarding the type of neighborhoods we want to create, the type of work environment we want to foster, and the amount of equal access to commerce we think is appropriate.¹⁹⁴ In all of these respects, civil rights legislation reaches private conduct, not just governmental conduct (which is required by the Constitution), and mandates a particular structure for society reflective of its public values. In short, constitutional and statutory law regarding race discrimination are both necessarily intertwined with public norms and opinions related to race discrimination.

V. CONCLUSION

While courts and scholars have battled over race discrimination standards for decades, they have generally overlooked the public's role in the conversation. Understanding public and cultural norms, however, is crucial when setting race discrimination standards because the meaning of race discrimination is culturally contingent, varying across time and context. Activity that falls on one of the extreme ends of the spectrum can be identified as discriminatory or appropriate with little effort, but the middle ground is ambiguous. Cultural norms help resolve this ambiguity. By analyzing the public's reaction to an ambiguous cartoon, the synergy between discrimination and public norms more becomes obvious and compelling. The failure to account for this synergy in antidiscrimination law creates the risk that a group of elites will substitute their world view for that of everyone else. In fact, the public's reaction to the Delonas cartoon suggests the courts may have done just that with the intentional discrimination standard.

1923) (1881). At most, the common law of torts simply reflects tendencies, which are even at odds with one another at times. *Id.* at 78. In the end, the law does not create prohibitions based on an inherent form of fault, "[w]hat the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise." *Id.* at 110.

¹⁹³ See Calabresi, *supra* note 191, at 717; Goldberg, *supra* note 191, at 519 (suggesting that modern changes in tort law were in response to political and social influences and were a move away from traditional torts based on other considerations); Sugarman, *supra* note 191, at 2432.

¹⁹⁴ Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601–3619, 3631 (2006); Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006) (prohibiting discrimination in public accommodations); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

APPENDIX

	Category 1	Category 2	Category 3	Category 4	Category 5
CNN: <i>Racism Row</i>	2		1	3	7
CNN: <i>Reckless/Careless</i>	34	5	0	5	22
Huffington Post	2		1	1	9
Fox News	12				2
Washington Times	16				4
Boston Globe	63	6	3	11	59
N.Y. Times: <i>NYP Apologizes</i>	89	5	11	9	165
N.Y. Times: <i>Chimp Stimulus Cartoon</i>	198	6	25	13	343
USA Today	87		12	4	39
St. Louis Dispatch	5		1		6
Milwaukee-Wisconsin J. Sentinel	3		1		4
St. Petersburg Times	12				7
Arizona Republic	5		4		2
Daily Herald-Arlington Heights, IL.	10	1	1		6
Miami Herald	24		2	3	25
Tulsa World	29		5	1	30
L.A. Times	9		1	2	14
San Francisco Chronicle	54		4		23
Total	654	23	72	52	767
Percentage	42%	0.0146%	4.59%	0.0331%	49%